

91-1158

No. _____

(2)

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,

Petitioners,

v.

THE STATE OF LOUISIANA, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

APPENDIX TO THE PETITION FOR
WRIT OF CERTIORARI

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**Julia Donelson HOUSTON, et
al., Plaintiffs-Appellees,**

v.

**Ruth M. THOMAS, et al., Defendants,
State of Louisiana and Lake Providence
Port Commission, Intervening
Defendants-Appellants.**

No. 90-1031.

United States Court of Appeals
Fifth Circuit.

Aug. 5, 1991.

Appeal was taken from an order of the United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., Chief Judge, which determined that accretions to west bank of Mississippi River were within territorial boundaries of State of Mississippi, rather than State of Louisiana. The Court of Appeals, Duhé, Circuit Judge, held that: (1) court clearly erred in concluding that boundary thalweg lay west of certain island in year that land was patented, and (2) court improperly applied doctrine of acquiescence to its factual findings.

Reversed and rendered.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ and DUHÉ, Circuit Judges.¹

¹ Judge Alvin B. Rubin was a member of the original panel but died on June 11, 1991 before this decision was rendered. This matter is being decided by a quorum. 28 U.S.C. § 46(d).

DUHÉ, Circuit Judge:

In a boundary dispute as treacherous as old man river itself, the appellants challenge the district court's conclusion that accretions to the west bank of the Mississippi River are within the territorial boundaries of Mississippi. Finding that the district court erred in its initial placement of the boundary thalweg between Louisiana and Mississippi, we reverse and render judgment for the appellants.

Meandering Through the Courts: The Proceedings Upstream

At issue in phase one of this bifurcated case was the sovereign ownership of a mass of accretions lying along the west bank of the Mississippi river near Lake Providence, Louisiana.² The action was originally instituted by Mississippi citizens in federal district court as a suit to quiet title against Louisianians asserting ownership of the accreted lands. One year later, the State of Louisiana and the Lake Providence Port Commission intervened, praying that the accreted portion be adjudged Louisiana property. The intervenors filed a petition in the United States Supreme Court, requesting that the court exercise its

² The appellees and some maps refer to these accretions as "Stack Island." These same maps also refer to a nearby island-shaped land mass by the same designation. While the latter exhibits true island characteristics, the accretionary features only exhibit such characteristics during very high water levels. To avoid confusion, we refer in this opinion to the disputed lands as "the accretions," "the accreted land," or "the accretionary features."

original jurisdiction in this dispute between states. Inexplicably, the High Court declined the invitation.

The case proceeded to trial on the question of state boundary only, where the district judge waded through the testimony of experts and would-be landowners, as well as maps, surveys, and charts dating back to the late nineteenth century. The court ruled that the interstate boundary, frozen by an avulsive shift in the river, placed the disputed lands within Mississippi. Alternatively, the court found that Mississippi had exercised sovereign authority over the accretions, and that Louisiana had acquiesced in Mississippi's assertion of ownership. From that judgment, Louisiana takes this appeal.

Wading In: Two Tales of One River

We begin our voyage down the river with a review of the factual bases for each party's ownership claim. Their tales are so divergent that each will be separately recounted.

Louisiana contends that at the time the land grant patent was issued to Stephen Blackwell in 1881, a land mass identified on the General Land Office survey as "Island Number 94," or "Stack Island," was subject to the divided flow of the Mississippi River. Although relatively narrow, the channel flowing to the east of the island comprised the main navigable thread, or thalweg, of the river.³ Accordingly, since federal common law fixes the

³ The term "thalweg" is a legal term of art used to describe the middle of the principal [channel] of a waterway. *Louisiana v. Mississippi*, 466 U.S. 96, 100, 104 S.Ct. 1645, 1648, 80 L.Ed.2d 74 (1984).

interstate boundary at the thalweg, Louisiana argues that the island was incorrectly attributed to Mississippi on the 1881 survey plat.

Louisiana notes that a sudden and perceptible (avulsive) change in the main course of the river occurred in 1882, when dikes constructed by the Mississippi River Commission induced a change in the flow pattern, diverting river traffic into the west channel. Because that change was avulsive, however, the boundary remained legally fixed in the east channel. Flooding enlarged the east channel in 1912, filling the west channel impassibly with silt, and restoring the east channel to dominance. Meanwhile, Stack Island was gradually eroding away, and its fragments were accreting downstream on the west bank of the river near Lake Providence. Eventually, Louisiana suggests it was replaced by a new island formed in approximately the same location. Louisiana further claims that at all relevant times, it exercised sovereign authority over the disputed portion.

In contrast, Mississippi argues that in 1881, shoreline surveys and government lights indicated that the thalweg of the river was located to the west of Stack Island. Because the middle of the west channel formed the interstate boundary, the thalweg, Stack Island was properly attributed to Mississippi in the land grant survey. Mississippi acknowledges that the east channel gradually enlarged in the early 1900's, and the west channel was abandoned by navigation when it filled with silt and alluvium. However, because it characterizes that gradual shift as "avulsive" in nature, it suggests the interstate boundary remained fixed in the west channel.

Though it concedes the island has undergone substantial changes due to the processes of erosion and accretion, it maintains that the "original" Stack Island never eroded away. Finally, Mississippi maintains that it has consistently claimed, taxed, and exercised dominion over the accreted portion.

Navigating a Legal Course: The Rules of the River

Under the "Rule of the Thalweg," when a navigable river flows between states, the middle thread of the main channel of the river constitutes the interstate boundary. *Iowa v. Illinois*, 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55 (1893). In early cases, courts defined the "main channel" as the deepest and most navigable branch of a waterway. However, in *Louisiana v. Mississippi*, 466 U.S. 96, 104 S.Ct. 1645, 80 L.Ed.2d 74 (1984), noting that the descriptions "deepest" and "most navigable" are frequently not synonymous, the Court refined the rule. Accordingly, current law dictates that the channel used as the "ordinary course of traffic on the river" is the river's thalweg. *Id.* at 101, 104 S.Ct. at 1648.

At least one exception to the Rule of the Thalweg is recognized: where an avulsive shift in the course of the river occurs, the boundary remains frozen in the former thalweg. Thus, "where a stream, which is the boundary, for any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary. . . ." *Nebraska v. Iowa*, 143 U.S. 359, 361, 12 S.Ct. 396, 397, 36 L.Ed. 186 (1892).

Although "true" avulsive action is typically described as sudden and perceptible, our court has modified that characterization, opting to apply the avulsion exception where a change in the identity of the thalweg was slow and gradual. In *Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167 (5th Cir.), cert. denied, 293 U.S. 591, 55 S.Ct. 106, 79 L.Ed. 686 (1934), the ownership of Glasscock Island, a land mass in the Mississippi River, was the subject of a dispute between a Mississippi resident and a Louisiana corporation. The evidence revealed that although the east channel was once the thalweg, the west channel had gradually become dominant through the natural, dynamic forces of the river. While not contesting the original designation of the east channel as the thalweg, the Mississippi plaintiff argued that absent a sudden, perceptible shift in the river's course, the interstate boundary should follow the main channel of the river as it shifted westward.

Our court relying on *Missouri v. Kentucky*, 11 Wall. 395, 20 L.Ed. 116 (1870), disagreed. Though noting that "strictly speaking there was no avulsion," *Id.* at 168, it concluded:

... where the main channel changes from one side of an island to the other, it seems that the same rules as to boundary govern as are applied in cases of avulsion. . . . The old channel remains the boundary in the case of an island as well as in that of an avulsion.

Id. Thus, in the case of an island, even a gradual change in the orientation of the thalweg effects no change in the boundary, or in the sovereign ownership of the island.

Distilling these legal principles, we apply a two-step analysis in resolving this factual dispute. First, we determine which channel constituted the boundary thalweg in 1881. Second, we consider whether, under the *Hogue* exception, that boundary remained fixed notwithstanding a shift in the identity of the original thalweg. We conduct this inquiry against the backdrop of the clearly erroneous standard, giving due regard to the trial judge's assessments of the witnesses' credibility. See Fed. Rule of Civ. Pro. 52(a).

Step One: Looking Back to 1881

The appellants submit that the district court clearly erred in concluding that the boundary thalweg lay west of Stack Island in 1881, the year the land was patented to Stephen Blackwell. We agree.

In reaching its conclusion, the district court relied primarily on the interpretation given by Austin Smith, Mississippi's only expert witness, of information contained in an 1881 shoreline survey. The district court considered the surveyor's notation of a "good deep channel" to the west of the island, and Smith's testimony that depth was the determinative factor, as persuasive evidence of the dominance of that channel. It also noted the presence of a government navigation light on the west bank of the river near the island, concluding that light served to guide river traffic from the head of Stack Island down the west channel. Without elaboration, the court pronounced an 1881 survey accompanying a Mississippi River Commission (MRC) study inconclusive, and declined to consider it in formulating its findings.

Although we acknowledge that the district court's findings are entitled to deference, after our review of the evidence, we are "left with the clear impression that an error has been made." *Stauffer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir.1967).

We recognize that it is not within the province of the reviewing court to second-guess the district court's assessment of Smith's credibility as a witness. However, it is apparent that Smith disregarded the only conclusive pieces of evidence in formulating his opinion. The first such piece of evidence is the hydrographic survey completed in December of 1881 pursuant to a major Congressionally-funded MRC improvement plan. That plan, for which Congress appropriated nearly one million dollars, was designed in part to improve navigation in the vicinity of the Lake Providence reach. The report issued in 1883 at the conclusion of the project clearly designates the east channel as the "main channel" at the time of the December 1881 survey. For example, the report lists as one of the "general effect[s] of the work" the "closing of the main channel of the river . . . and bringing it back to the [downstream] right of Stack Island by a system of deflecting dikes."

The report continues:

. . . In order to force the main channel of the river which flowed down the [east channel] . . . a main dike . . . was driven from a point below the foot of Baleshed Bar to the head of Stack Island, leaving the low water main channel from Longwood through the [east channel] open for the passage of boats. (emphasis added)

The district court also ignored the hydrographic data contained in an MRC survey depicting the topography and hydrography of this portion of the river in 1881-82. While those data indicate the presence of shoals near the northern end of Stack Island in the west channel, the hydrographic soundings depict ample depths, even at low water, for typical river traffic in the east channel. Given these facts, it is illogical that vessels would employ a route that was not only approximately one mile longer, but also marked by treacherous shoals.

The evidence relied upon by Mississippi, Smith, and ultimately the district court simply does not contain the type of data necessary to support a contrary conclusion. The 1881 *shoreline* survey was not intended to reflect the hydrographic features of this part of the river, nor does it. Unlike the MRC survey, done in anticipation of major dike construction in the river itself, the shoreline survey of Stack Island was intended for patent purposes only, and contains no true hydrographic readings.

The deputy surveyor's vague notation of a "good deep channel" to the west of the island is less than determinative. Not only is the depth of the channel no longer the focus of our inquiry, *Louisiana v. Mississippi*, 466 U.S. at 101-02, 104 S.Ct. at 1648, but the survey fails to reflect any depth soundings in the east channel.⁴ Because

⁴ The shoreline survey does make some reference to "shoals" at the foot of the east channel. This finding is refuted by hydrographic data obtained just three months later and depicted on the MRC survey map. Although we cannot resolve factual disputes, we note the inconsistency in the evidence to demonstrate the inconclusiveness of the shoreline survey.

we endeavor to determine the relative dominance of the channels, the shoreline survey simply does not contain the type of data necessary to determine the identity of the thalweg in 1881.

Equally inconclusive is the placement of the U.S. navigation lights along both banks of the river as reflected on the shoreline survey. In the vicinity of the Lake Providence reach, that survey depicts a navigation light on the east bank of the river at Reserve Plantation near the northern tip of the island, a light on the west bank directly across from the island, and a light on the east bank near the Shipland Landing south of the island. The MRC survey, completed only three months later, depicts two lights in the vicinity of the Reserve Plantation, a light on the west bank beyond the southern tip of the island, and the Shipland Landing light on the east bank. The MRC survey does not depict a navigation light on the west bank near the mid-point of the island as does the shoreline survey.

Regardless of the resolution of that factual dispute, the placement of the lights does little to determine the identity of the *low-water channel*. As the district court found, plantations located on both sides of the river were serviced by steamboats that were presumably able to use either channel at high water. Since navigation lights were needed to assist these vessels, the depiction of the light on the west bank cannot compensate for the inadequacies in the shoreline survey.

Thus, we find the court clearly erred in relying upon evidence that, regardless of its veracity, could not support

its finding. In rejecting this evidence, and Smith's interpretation of it, we note that we are not the first court to do so. In prior litigation between these same states, the Supreme Court rejected Smith's theory regarding the placement of an interstate boundary, criticizing his undue emphasis on which channel was the deepest and swiftest. *Louisiana v. Mississippi*, 466 U.S. at 103-06, 104 S.Ct. at 1649-1651. Noting that the "Smith [boundary] line did not conform to the data on the surveys . . . [and] that it was not conceivable that a mariner would adopt Smith's track of navigation," the court adopted Louisiana's proposed placement of the thalweg instead. For the reasons outlined above, we do likewise.

*Freezing the Boundary:
An Avulsive Shift?*

As the district court noted, both parties generally concede that flooding in 1911 and 1912 shifted the thalweg from the west channel to the east channel. The difference, of course, is that Mississippi suggests the thalweg was originally in the west channel, while Louisiana suggests it was diverted there from the east by the dike construction in 1882-83. Because the district court determined, as a threshold matter, that the thalweg originally lay in the west channel in 1881, it found it necessary to consider whether the 1911 shift was avulsive. Concluding that it was, the court ruled that the interstate boundary was frozen in the west channel.

Our reversal of the district court's ruling on the original location of the thalweg obviates further discussion of the avulsion issue in light of the law of this circuit.

Both parties agree, and the district court found, that the main channel lay to the west of the island from 1883 to 1911, and then shifted to the east thereafter. However, the question of whether that shift, or any prior one, was "avulsive" is irrelevant as a matter of law in this context. Under our holding in *Hogue*, even a gradual change in the identity of the "main" channel around an island effects no change in the boundary. Thus, the boundary remained frozen in the east channel, where it lay at the time of the patent in 1881, regardless of the nature of any shift in the river's course. *Hogue*, 69 F.2d at 168.

Acquiescence

Alternatively, the district court concluded that the disputed lands belonged to Mississippi under the Doctrine of Acquiescence. Because we find the district court improperly applied the law to its factual findings, we reverse this ruling as well.

Numerous cases recognize that acquiescence by one state in the exercise and preservation of an interstate boundary by another is conclusive evidence of the location of the official boundary. See e.g., *Rhode Island v. Massachusetts*, 4 How. 591, 638-39, 11 L.Ed. 1116 (1846); *Virginia v. Tennessee*, 148 U.S. 503, 522-525, 13 S.Ct. 728-735-37, 37 L.Ed. 537 (1893); *Louisiana v. Mississippi*, 202 U.S. 1, 53-57, 26 S.Ct. 408, 422-425, 50 L.Ed. 913 (1906). The Supreme Court has even noted that the doctrine pre-empts the "Rule of the Thalweg" when "it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area. . . ." *Arkansas v. Tennessee*,

310 U.S. 563, 567-72, 60 S.Ct. 1026, 1030, 84 L.Ed. 1362 (1940).

Over strenuous and repeated objection from the appellants, the district court permitted the introduction of the testimony of numerous residents of the disputed lands. A colorful assortment of Mississippi citizens testified that they had occupied the accreted lands as owners, had run cattle there, had hunted and fished, and even engaged in the illegal cultivation of marijuana. There was some evidence that Mississippi assessed taxes against those individuals, although it is disputed whether the property taxed was Stack Island or the accreted lands. Other evidence suggests Mississippi law enforcement agents exercised criminal jurisdiction over the island.

Louisiana citizens testified to similar facts. Some indicated that they had hunted or fished on the lands with Louisiana licenses, and that wildlife agents had enforced Louisiana game laws on the accretions. Furthermore, Louisiana argues residents of the disputed lands have paid taxes on the accreted portions to the state of Louisiana.

Without regard to the correctness of the district court's findings on these disputed factual issues, and assuming without deciding that the evidence was properly admitted, we find much of this evidence irrelevant to the question of acquiescence. Distinct from any state law theory of adverse possession, the federal common law doctrine of acquiescence is premised upon proof of the relationship between sovereigns. Thus, details of discreet activities of individuals such as hunting, fishing, or farming are largely irrelevant. Although evidence of the

assessment of taxes by a sovereign is sometimes probative, see e.g., *Arkansas v. Tennessee*, 310 U.S. at 567-72, 60 S.Ct. at 1029-1031, its persuasiveness is diminished in cases like this one where there is some evidence that both states claimed the disputed lands as a tax base.

Discounting that extraneous testimony, we are left with little evidence of any acts committed by agents of the state of Louisiana that indicate its recognition of the sovereign authority of Mississippi over the accreted lands. There was some testimony that Louisiana law enforcement agents had handed over a suspected law breaker to Mississippi for prosecution for an offense allegedly committed on the accretions. However, a few such isolated incidents do not constitute a "long-continued and uninterrupted assertion of dominion and jurisdiction over an area. . . ." *Arkansas v. Tennessee*, 310 U.S. at 471, 60 S.Ct. at 1030. Those acts are simply not of sufficient duration and magnitude to justify application of the doctrine. See e.g., *California v. Nevada*, 447 U.S. 125, 130-32, 100 S.Ct. 2064, 2067-68, 65 L.Ed.2d 1 (1980) (where the evidence established California's recognition of a putative boundary for over 100 years); *Arkansas v. Tennessee*, 310 U.S. at 567-72, 60 S.Ct. at 1029-1031 (applying the doctrine where the evidence showed unchallenged an unequivocal dominion by Tennessee for 115 years); *Louisiana v. Mississippi*, 202 U.S. at 53-57, 26 S.Ct. at 422-24 (involving over 90 years of acquiescence by Mississippi). Reviewing the district court's application of the law to its factual findings *de novo*, we cannot sustain the district court's ruling on the issue of acquiescence.

Conclusion

For the foregoing reasons, we reverse the judgment of the district court adjudging the disputed property within the state of Mississippi, and enter judgment in favor of the appellants.

REVERSED and RENDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1031

JULIA DONELSON HOUSTON, ET AL.,

Plaintiffs-Appellees,

versus

RUTH M. THOMAS, ET AL.,

Defendants,

STATE OF LOUISIANA and LAKE
PROVIDENCE PORT COMMISSION,

Intervening Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion August 5, 5 Cir., 1991, F.2d)

(October 22, 1991)

Before POLITZ and DUHE, Circuit Judges.*

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT: CLERK'S NOTE:

/s/ John M. Duhé
United States
Circuit Judge

SEE FRAP AND LOCAL
RULES 41 FOR
STAY OF THE
MANDATE.

*Judge Alvin B. Rubin was a member of the original panel but died on June 11, 1991 before this decision was rendered. This matter is being decided by a quorum. 28 U.S.C. Section 46(d).

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL

PLAINTIFFS,

V.

RUTH M. THOMAS, ET AL

DEFENDANTS.

CIVIL ACTION
NO. W86-0080(B)

BENCH OPINION

BEFORE: THE HONORABLE
WILLIAM H. BARBOUR, JR.,
UNITED STATES DISTRICT JUDGE

DATE: JUNE 23, 1989

PLACE: VICKSBURG, MISSISSIPPI

APPEARANCES:

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MR. CALVIN ADAMS

COURT REPORTER:
MS. CELESTE O. McCLELLAND, RPR

[p. 2] THE COURT: The Court has heard the evidence in this case, has heard the arguments of counsel,

and is prepared at this stage to render this bench opinion expressing finding of fact and conclusions of law as to the issue presented by the bifurcated portion of this trial.

The issue presented to the Court at this stage of the trial is basically a very simple one. It is whether the land mass in question, sometimes referred to as Stack Island or Island Number 94, lies in Mississippi or in Louisiana.

The Court makes the following findings of fact. The Plaintiffs in this case, Julia Donelson Houston, et al., are the record owners of Island Number 94 which is also referred to as Stack Island. That island was originally patented to their predecessors in title, a Mr. Blackwell, as a part of Issaquena County, Mississippi. The Court will not attempt to discuss the Plaintiffs individually but simply will say that title has been properly deraigned from the original patentee, Blackwell, to the Plaintiffs, who the Court will refer to as the Houstons.

In 1881 an island known as Island Number 94, which was also shortly thereafter or even at that time known as Stack Island, was patented to Blackwell. It lay in the vicinity of Lake Providence, Louisiana, in the stretch of the Mississippi River known as Lake Providence Reach. It is clear from the history of the work done by the Corps of Engineers in the [p. 3] Lake Providence Reach that this reach being a long reach was and has been a very unstable reach of the Mississippi River for a long period of years. In fact, it was one of the first two projects undertaken for stabilization of the navigation channel by the Mississippi River Commission which was formed in the early 1880s about the time the island was patented.

The island has been subject to quite a bit of legal controversy. This Court in the late 1970s decided the case of *Houston versus United States Gypsum Company* which was taken to the Court of Appeals for the 5th Circuit on three different occasions and recorded in the Federal Reporter Second Series with three different written opinions. That case was a contest between Mississippi owners over the ownership of the island and resulted eventually in a determination that the Houstons were the owners of the island as against the other Mississippi claimants. That lawsuit did not determine whether the island was in Mississippi or Louisiana nor did it determine whether any of the Louisiana riparian owners had any claims to the island.

The island was also subject to a lawsuit dealing with title thereof in Issaquena County, Mississippi, in the Chancery Court in about 1937 or 1938. That lawsuit was eventually settled between the prior owners and the Houstons. The Houstons had acquired title to the land through a deed of trust foreclosure sale and the propriety of [p. 4] that sale was the basic issue of that lawsuit.

The issue presented in this lawsuit was raised by the filing of the suit by the Houstons against the Louisiana riparian owners seeking in effect to quiet title to the property against the Louisiana land owners in favor of the Houstons. Since the issue was raised as to whether the land lay in Louisiana or Mississippi, the State of Louisiana joined as a Plaintiff Intervenor, and it joined the State of Mississippi as a Third Party Defendant.

The Houston Plaintiffs not only claim that the land is in Mississippi but also claim that even if the land is in

Louisiana that it by virtue of the doctrine of adverse possession or the corresponding Louisiana doctrine has title to the property as against anyone who owns land adjacent to the bank of the Louisiana side.

The State of Louisiana is interested insofar as is [sic] it claims and desires for the land in question to be included in the State of Louisiana for purposes of its own people, for tax purposes and other purposes.

The State of Mississippi logically prefers the land to be in the State of Mississippi. The State of Mississippi has adopted the arguments and proof of the Houston Plaintiffs.

The State of Louisiana is actually a set of Defendants, being the State itself as well as the Lake Providence Port Commission, a state agency, which owns riparian lands across [p. 5] the port channel from the south end of the land in question, and also by virtue of recent quitclaim deeds by which the Port Commission acquired record title to a portion of the land mass in question from various individual riparian owners who were joined as Defendants.

Also a Defendant in the case is the Fifth Louisiana Levy [sic] District which is an entity organized and existing for the purpose of maintaining the Mississippi River levies [sic] as well as other levies [sic] in a four parish district lying along the Mississippi River running south from the Arkansas/Louisiana boundary. The Levy [sic] District has claims to portions of the land mass as well as the Lake Providence Port Commission. The Court will not at this time attempt to sort out the various other named Defendants in the case, many of whom who have suffered

default judgments and others of whom who have transferred title to the Lake Providence Port Commission. That will remain for the second portion of the trial.

The issue, as stated earlier, for the Court at this time on the bifurcation portion concerns whether the land mass in question is Mississippi land or Louisiana land.

In addressing the overall issue, the first question presented to the Court is whether Stack Island, or Island 94, lay in Mississippi or Louisiana at the time of its patent to Blackwell in 1881. The patent itself was not issued, until 1888. It was based, however, on a survey which was preformed [p. 6] on August 11 and 12 of 1881. The parties appear to agree that although the patent was not issued until 1888 that it relates back to the day of the survey in August of 1881. The map prepared from the survey was introduced into evidence as P-8. The basic issue presented in this question as to where the boundary line between Mississippi and Louisiana lay at the time of the survey on August 11 and 12 of 1881 concerns the boundary thalweg of the Mississippi River on those days.

The concept of the thalweg constituting the boundary between states having a river as their common boundary was recently discussed by the United States Supreme Court in the case of *Louisiana versus Mississippi* reported at 466 US 96. This is a case that was decided in 1984. Beginning at page 100 the Court stated in regard to the boundary thalweg as follows: "The matter is further complicated by the fact that the definition of the term 'thalweg' has not been uniform or exact. The master notes in his report that this Court observed in an earlier case that the term has been defined to mean 'the middle or deepest

or most navigable channel', but he points out correctly that 'the middle' or 'deepest' or the 'most navigable' are not necessarily one and the same. Indeed, this Court itself acknowledged this fact in *Michigan versus Wisconsin*. (Deepest water and the principal navigable channel are not necessarily the same.) The doctrine of the thalweg has evolved from the presumed intent of Congress in [p. 7] establishing state boundaries and has roots in international law and in the concept of the equality of access."

"What emerges from the cases, however, is the proposition that the live thalweg is at the 'middle of the principal channel, or rather, the one usually followed.' As the master observed, and as the parties appear to agree, 'the thalweg defines the boundary, and the ordinary course of traffic on the river defines the thalweg.' Our task, therefore, is to identify the downstream course of river traffic. It appears to us, as it did to the master, to be a matter of evidence as to the course commonly taken downstream by vessels navigating the particular reach of the river. It is to the evidence that we now turn."

Thus the Supreme Court has outlined the definition of boundary thalweg as the most navigable downstream course in the river. The Court is thus required at this time to consider the evidence all the way back to 1881 and decide at that time where the most navigable channel lay.

Plaintiffs present their Exhibit P-7 as their primary evidence, that being the survey of Island Number 94 as of August 1881. The Court notes that the surveyor at that time shows a "good deep channel" with "no bottom" running to the west of the island. The surveyor also notes

along the west channel of the river "heavy caving of bank."

On his plat along the east side of the island the [p. 8] surveyor shows "east chute of river of Mississippi River" together with a "depth of 12 feet" up at the northern end of the east chute and a notation of "shoals" at the south end of the chute which lies along the east side of the island and between the island and the Mississippi mainland.

The Court would normally conclude from this map that the surveyor clearly meant to indicate that the main channel of the Mississippi River, which logically would be the channel followed by boats on a downstream course, to be to the west of the island.

The State of Louisiana and the Fifth Louisiana Levy [sic] District, which basically has the same position and has adopted the proof of the State of Louisiana and the Port Commission, and the Court will hereafter basically refer to all of them simply as the State of Louisiana, rely on charts of the Mississippi River Commission Numbers 43 and 44 which bear Exhibit Number LA-10 and on a report of the Mississippi River Commission and an attached map marked LA-18-A.

LA-10 consists of two charts taped together showing the entire reach of the river at Lake Providence. Chart Number 43 is the upper part of LA-10 and Chart 44 is the lower part. Chart 43, according to its legend, was prepared as to the topography and hydrography in 1881 and 1882. Chart Number 44 was prepared in regard to the topography and hydrography in 1882/83. Consequently

LA-10 was prepared [p. 9] subsequently to the surveyor's map, P-7.

The State of Louisiana urges that LA-10 shows that the main channel for navigation purposes lay in the chute to the east of Stack Island. As evidence of this Louisiana sites the location of United States navigation lights on the west bank of the river south of the island and on the east bank of the river at the upper end of the Stack Island chute and just opposite the northern end of Stack Island.

There is also a second navigation light on the opposite side of the river just upstream from the head of the island. The next light upstream is at Longwood Landing on the west side of the river.

The experts for Louisiana postulate that traffic traveled downstream from the Longwood Landing light over to the head of Stack Island and down the Stack Island chute to the navigation light back on the west side of the river south of Stack Island.

The State of Louisiana further argues the November 1883 report of the Mississippi River Commission engineer attached as LA-18-A together with the map or chart attached to that report. That chart showed conditions as of October 31, 1883. The report on page 423 under paragraph 4 states that "the closing of the main channel of the river, which passed between the foot of Baleshed Bar and the head of Stack Island, and bringing it back to the right of Stack Island by [p. 10] a system of deflecting dikes located on the Louisiana side of Elton Bar." And then later, . . . "so as to prevent further caving of the Mississippi shore behind the island which is already done a

great deal of damage and was increasing at an alarming rate."

On page 425 of the same report under the heading Stack Island the report says "in order to force the main channel of the river, which flowed down the Stack Island the chute, on the outside and along the face of the island between it and the Elton Bar." And then it goes on to state "the dike system that we built at the head of the Stack Island between Stack Island and Baleshed Bar, upstream of Stack Island."

The chart in the map attached to LA-18-A shows an old steamboat channel which the Louisiana parties urge indicates an old steamboat channel coming out of the Stack Island chute crossing between Stack Island and Baleshed Bar over toward the west bank of the river.

From these two exhibits and their interpretation by their experts, the Louisiana parties urge that the main navigation channel for downstream traffic by the time of these reports, 1882 and 1883, was down the Stack Island chute to the east of the island. They urge that since there was bank caving at the time these works were planned and because the Mississippi River Commission chose this stretch of river for its first work, that obviously there was a problem in [p. 11] holding the Mississippi shore and the thalweg must have been there. They argue that this must have occurred before the patent and that the survey was simply wrong.

In opposition to this theory the Plaintiffs and the State of Mississippi urge a logical reading of P-8 which is a chart of the Lake Providence Reach as depicted by a shoreline survey executed in October and November of

1881 for the Mississippi River Commission. That chart shows a Government light at the end of 1881 only a couple of months after the survey was completed not only upstream from Stack Island on the eastern bank but also across from the middle of Stack Island on the west bank. This Government light was not shown on LA-10. Mr. Smith, the expert for the Plaintiffs, drew the line which he felt was the thalweg which runs from Government light at Longwood Landing on the west side of the river across to the Government light north of Stack Island on the east side of the river, back across to the west side of the river to the Government light in the area of Albright [sic] Plantation of Mrs. M.B. Blackwell and then down the west bank of the river until it again turns back to the east bank at Shipland Landing.

The Court notes that this is an earlier map. The Court accepts the logic of Mr. Smith in that the reason for the Government light on the west bank would be to delineate the normal channel back from the east bank to the west bank and [p. 12] therefore to the west side of Stack Island.

The Court further notes in regard to this stretch of river that there were several plantation landings in 1881 and 1882 along the east bank. Beginning at south end of LA-10 there is a Shipland Landing. Further up near the southern end of Stack Island is a Ben Lowman [sic] Landing. About halfway up the east chute is Elsey [sic] Landing. Further up past the navigation lights on the east side is Reserve Landing and then slightly above that there is an Oakley Landing. Further up the river there are a Holly Ridge Landing and a Homochitto Landing.

Accordingly, the east bank of the river along this stretch was apparently fairly well developed from a plantation standpoint. It appears logical to the Court that the east channel would be used regularly by steamboats servicing these plantation landings. Accordingly, there does not seem to be any question that there would be traffic up the east chute or down as the case may be. This might explain the second Government navigation light in the vicinity of the north end of Stack Island as depicted on LA-10. At any rate, the Court does not think that this defines the normal downstream thalweg for the river and notes that also there are landings on the west side of the river, Lake Providence Landing, Arlington Landing, and Longwood Landing.

[p. 13] The Court is thus faced with conflicting evidence as to what the normal course of downstream navigation was in 1881 on this stretch of river. The Court finds that a preponderance of the evidence favors the Plaintiffs theories for the following reasons. It would appear that a surveyor making this survey of the island in 1881 would certainly be aware of the fact that the island would have to be patented either in Mississippi or Louisiana.

The surveyor indicated the good deep channel on the west side of the island. It seems clear to the Court that in August of 1881, if you rely on the survey itself, that the Court would have to find that the channel ran to the west side of the island. This theory is supported by the next most recent evidence being the shoreline survey P-8 which was conducted in October and November of 1881. The Government light on the west side of the river being the next downstream light from that at the head of Stack

Island would support Mr. Smith's theory as to the normal thalweg or downstream navigation route. The Court notes that in the west side of the river according to P-8 between Baleshed Bar to the north and the end of Stack Island to the south are depicted sand bars which would indicate that boats would need to swing to the east side of the river before swinging back to the west side. The Court feels that the old steamboat channel on the map attached to LA-18-A appears to be in the vicinity not [p. 14] only of this traversing thalweg of the river but also along the same line that the secondary traffic coming up the east chute might take, particularly taking into account the Baleshed Bar lying to the north of Stack Island.

The Court also does not find that the report itself, LA-18-A, is as conclusive as the Louisiana parties feel it is. The Court notes that LA-10 and P-8 both indicate substantial erosion of the bank along the north end of Stack Island on the Mississippi side. In fact, Louisiana 10 seems to indicate that the levy [sic] had been breached by the time of the making of that map.

The Court reads the report and these maps to indicate that the river certainly is trying to switch its course into the east chute but not necessarily that it had by 1881. The Court, accordingly, rules that as of the date of the survey that the thalweg and therefore the boundary between Mississippi and Louisiana lay to the west of Stack Island. Therefore the Court concludes that at that time Stack Island was a part of the State of Mississippi rather than a part of the State of Louisiana.

The parties agreed generally that about 1911 to 1913 that the main channel of the river switched to the east

side of Stack Island. The flood charts introduced into evidence show that a substantial flood occurred at the end of 1911 and the early part of 1912. Louisiana, of course, has claimed [p. 15] that the main channel was in this east chute in 1881 and that it evulsed [sic] to the west side of the island in 1882 and 1883 when the dikes depicted on the map attached to LA-18-A were built by the Mississippi River Commission.

It appears to the Court that a preponderance of the evidence shows that this was the time and the cause of the switching of the main channel of the river to the east chute. This was an evulsive [sic] change.

Evulsive [sic] changes of the boundary thalweg do not change state boundaries. *Reserve* [sic] *versus* *State of Kentucky* 78 US 395; *Davis versus Anderson Tulley* [sic], 252 Federal Reporter, 681, 8th Circuit, 1918; *Washington versus Oregon*, 211 US 127.

Accordingly, the evulsive [sic] change which occurred in 1911 and 1912 did not change the boundary from the west side of Stack Island to the east side. In fact, the Court finds that the boundary has remained on the west side of the island until the present time. The Court in *Davis versus Anderson Tulley* [sic] stated that under the conditions of an evulsive [sic] change that the boundary remains in the old channel subject to subsequent changes in that channel brought [sic] by accretion and erosion while the water in it remains a running stream.

The next question to be answered by the Court is whether the land mass in question is the same island as Island 94, sometimes known as Stack Island, as depicted in the 1881 [p. 16] survey. Louisiana basis [sic] its claim to

the contrary primarily on series of navigation charts introduced as LA-21, 26, and 29. Basically these are annual charts of the river. Those charts show land masses within the stream as well as other features. Mr. Harrison, the expert for the Louisiana parties, superimposed on each of those charts the location of Stack Island and its shape as it existed in 1881 at the time of the patent survey. The Louisiana parties argued that by looking at those charts, that it is apparent that the migrating Stack Island, which was eroding and accreting and migrating generally in a southwesterly direction, by 1954 had moved out from under any portion of the superimposed original island and therefore had disappeared and therefore that the land mass that remains today is not the same island as Island 94, or Stack Island.

In support of this argument the Louisiana parties further assert that another island has now formed in the approximate position of the 1881 Stack Island and further that that land mass is now identified on the Government charts as Stack Island. The Court notes that there are two Stack Islands identified on the chart presented by the Louisiana parties, this "new" Stack Island as well as the land mass in question.

The Court does not accept the theory of the Louisiana parties. It is clear from the Louisiana exhibits themselves, [p. 17] LA-21, 27, and 29, that there has always been a land mass from 1881 to the present time which map by map can be traced from the original Stack Island. It is interesting to note that this very active stretch of the river between 1881 and the present eroded the west bank of the river in the Lake Providence area by up to a mile and that it from time to time has placed and removed not only

substantial sand bars but whole islands. Throughout this time period, however, substantial remnants of the original Stack Island have existed. In fact, Stack Island started out as some 700 acres. According to one survey it grew to a substantial but undetermined acreage. It reduced and then in the 1970s it was back up in the range of 4,000 acres. At the present time the land mass claimed by the Plaintiffs is of approximately 2,000 acres. During all of this time, however, some portion of Stack Island has remained above the low water mark and can be traced to an earlier map.

The Court concludes by a preponderance of the evidence that the land mass which now lies against the Louisiana bank and which is the portion claimed by the Plaintiffs, is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretions less erosion. This is clearly illustrated by the overlay prepared by Mr. Smith and introduced as Exhibit P-37-B depicting various maps made at various times.

[p. 18] Of course, after approximately 1930 we have live testimony from witnesses who either worked or lived in that area and there is no testimony whatsoever that Stack Island disappeared. The Court simply thinks that the Louisiana parties' position that Stack Island disappeared because it moved out from under the location of the original Stack Island is not well taken, that such a theory would have to depend on the island entirely going under water without having anything left of it at a particular moment in time.

Accordingly, the Court finds that even though this land mass is now basically up against the Louisiana shore

and for large portions of the year completely dry between what is called the island and the high bank on the Louisiana side, that it is the remnant of Stack Island and is still owned by the Plaintiffs subject to any adverse possession claims that might be disposed of later by the Court.

The thalweg or boundary thalweg therefore remained on the west side of Stack Island during this process of southwestwardly migration over the long period of time between 1881 and about 1954. During that period the boundary was subject to the remains of the old west channel as it was changed from time to time by accretion and erosion. In approximately 1954 the flow on the west side of Stack Island ceased. At that time the boundary became fixed and is the boundary at this time. That boundary was platted by Mr. [p. 19] Smith by geographical calls as set forth in the original complaint filed in this case and was placed on Exhibit P-32. The Court finds that that boundary is the fixed boundary between Louisiana and Mississippi.

The final question to be addressed by the Court is how much of the land mass claimed by the Plaintiffs is Stack Island. As the Court stated earlier the land mass is sizeable [sic], consisting of approximately 2,000 acres at the present time and being a narrow land mass approximately 7 or 8 miles long lying along the west bank in the Lake Providence vicinity. The Plaintiffs claim that the northern end of Stack Island is the line between what was formerly a chute between Baleshed Towhead or Bar and Stack Island which was eventually closed by the Corps of Engineers. The Plaintiffs claim as the southerly end all of the accretions to the island which lie across from and

south of the Lake Providence Port lands and its facility in that area.

The major question for the Court to answer in this regard is whether the southerly end of the land mass known as Stack Island is in fact part of that island. It is clear from the various maps introduced into evidence but particularly the annual navigational maps, LA-21, 27, and 29, that at least two sand bars developed at the south end of Stack Island.

It was explained by one of the experts that sand bars at [p. 20] the toe of an island naturally form if there is a divided flow around the island. It is apparent that these sand bars eventually connected with Stack Island as it grew to exist along the Louisiana shore and gradually the sand bars built up and filled in so that they are for practical purposes an extended land mass all the way down the land claimed by the Plaintiffs.

The Court notes that some leases in approximately 1970 refer to "Stack Island proper", "middle bar", and "lower bar." These were references made by Ted Houston who is now deceased but who was one of the principals in the ownership and management of the property before his death. The Court notes that those leases were given to Captan Jack Wyly, who was one of the adverse claimants prior to his conveying his claim to the island to the Port Commission, and that he took the leases in his name for the purpose of grazing cattle over the whole land mass. Further, he also at a later time was instrumental in forming a hunting club and leasing that property. The Louisiana parties in opposition to this argument did present evidence through Mr. Wyly that the hunting club not only

leased the area known as Stack Island but also the adjacent banks for the purpose of controlling all of the land. And he explained that this didn't mean that he and the other Louisiana riparian owners were not claiming the island.

[p. 21] It appears logical to the Court that the formations south of what might be called Stack Island proper were accretions caused by the flow around that island, and that until they actually attached to the island they were sand bars and were not permanent land masses. The only thing to the contrary is the testimony of Mr. Harrison who claimed them to be islands. This claim, however, was made on the basis of the charts, which were navigation charts which clearly called those formations sand bars. The Court, accordingly, concludes that the entire land mass claimed by the Plaintiff is Stack Island and accretions thereto including the southerly end of it which runs down past the Port Commission.

The Court, accordingly, concludes that the Plaintiffs' claims to the land mass insofar as claiming that it is one land mass and that it lies in the State of Mississippi are proven by a preponderance of the evidence and the Court so finds.

The Houston Plaintiffs have also presented to the Court a theory under which it claims that the State of Louisiana has acquiesced in the jurisdiction over this land mass by the State of Mississippi and therefore that if Louisiana ever had claim to the land that it has in effect given up those claims through the doctrine of acquiescence to the State of Mississippi.

[p. 22] Because of the ruling of the Court, previously stated in this bench opinion, it is not necessary to discuss the doctrine of acquiescence. That doctrine is promoted by the Plaintiffs only in the event it does not prevail in regard to its basic theory that the island has migrated to its present position.

The Court, however, realizes that this piece of land has been subject to long, torturous, and expensive litigation by the Houstons as well as the other parties and will make a ruling in regard to the issue of acquiescence in the event the case is appealed and in the event the appellate Court might find the Court is in error in ruling on the first part of this bench opinion.

The Houston Plaintiffs claim that the State of Mississippi has exercised jurisdiction over Island 94, or Stack Island, since the patent to Mr. Blackwell which was issued by the United States of America making that island part of the State of Mississippi in 1881. The proof shows that since 1889 the taxes have been paid on the island to Issaquena County, Mississippi, which is the main land adjacent to where the original Island 94, or Stack Island, was located. The Houstons to this day continue to pay Mississippi ad valorem taxes on the property. The Plaintiffs also presented proof that the Sheriff of Issaquena County claimed jurisdiction over the island for criminal purposes, [p. 23] particularly for game violation purposes; and that although he said that he would not patrol the island, that he requested the Houstons to present any game violators on the island before the Courts of Issaquena County, Mississippi. The proof further showed that Sheriff Sam House, who interestingly enough later made a claim to part of the Stack Island area, personally

carried Charles Shelton and James Kelly who has leased Stack Island from the Houstons for hunting purposes over to see the Sheriff of Issaquena County, Mississippi, to request the Sheriff of Issaquena County to help the hunting club with trespassers and game violators. Apparently Sheriff House at that time considered Stack Island to be a part of Mississippi.

Later the proof showed that officers of the Louisiana State Police were flying in a small aircraft searching for marijuana patches when they discovered one on Stack Island. They did not attempt to excise [sic] jurisdiction over the island at that time but notified the Mississippi Bureau of Narcotics who thereafter obtained a search warrant for the purpose of searching the island. Mississippi was assisted by Louisiana authorities at that time and the Louisiana authorities actually arrested suspects on the island itself but immediately turned them over to Mississippi Bureau of Narcotics agents as soon as those agents could arrive from the State of Mississippi. Mississippi prosecuted those [p. 24] parties.

The proof to the contrary on the issue of acquiescence were relatively vague statements by Jimmy House, whose family still owns part of the riparian property, and Captain Jack Wyly, who claimed a part of the property at least until he deeded his property to the Port Commission recently, that the Louisiana reputation was that this was a part of Louisiana and that game wardens from Louisiana did sometimes go on the island. The Court doubts that there is any direct proof of game wardens from Louisiana ever patrolling the island.

The State of Louisiana parties further assert that in 1908 by Legislative Act Number 191 the Louisiana Legislature authorized the vesting of the title to islands in the Mississippi River to the Fifth Louisiana Levy [sic] District. The exhibits introduced into evidence clearly show that beginning about 1907 the Levy [sic] District was interested in assisting the U.S. Army Corps of Engineers in obtaining willow logs for use in building revetments along the Louisiana bank. The islands in the river apparently had substantial growths of willow in which the Corps was interested. Knowing that there were adverse claims to those islands, the Levy [sic] District passed a series of resolutions, corresponded with the Corps about the willows, and eventually requested and prevailed in obtaining the 1908 legislation allowing the State of Louisiana to transfer the islands to it.

[p. 25] The Court at this juncture will note that under the law of the State of Louisiana, islands in the Mississippi River west of the Louisiana-Mississippi line belong to the State of Louisiana. This is not the law in Mississippi. The islands on the east side of the Mississippi-Louisiana boundary belong to the riparian owners. The Court notes in passing at this point, however, that Stack Island, or Island 94, occupies a peculiar position in that it was patented to Mr. Blackwell who was not the riparian owner at the time.

At any rate, the question then arises as to whether during the 1907 through approximately 1911 time period the activities of the Fifth Louisiana Levy [sic] District constituted acts that might break the sovereign control of the State of Mississippi over Stack Island and therefore

destroy the claim of acquiescence by the Plaintiffs in the State of Mississippi.

The Court notes first that Act 191 passed by the Legislature of Louisiana cannot be read to convey title to Stack Island itself. It is an extremely general statute. The Court further notes that the survey commissioned by the Fifth Louisiana Levy [sic] District of the islands, the plat of which was introduced as LA-37-A-1, does not purport to show Stack Island at all. At that time it is clear that Stack Island lay opposite the port of Lake Providence itself and the plat is noticeably absent in showing a land mass in that [p. 26] area. The Islands 7, 8 and 9, being the islands shown on the plat, lie well to the south of where Stack Island lay at that time.

The Court, accordingly, concludes from a preponderance of the evidence that even if it is wrong in concluding that the boundary thalweg lay always to the west of Stack Island and, accordingly, that Stack Island was in fact in Louisiana at some time, that Louisiana has acquiesced in the exercise of the exclusive jurisdiction over the island by the State of Mississippi and that it is now in the State of Mississippi. The cases appear to place a minimum time limit for acquiescence in the range of 35 to 40 years. The Court notes that the acquiescence was clear from 1881 to 1907, a period of 26 years. The Court does not feel that the activity by the Louisiana Legislature was prompted by the Fifth Louisiana Levy [sic] District in the period from 1907 to 1912 was such as to interrupt the period of exclusive jurisdiction by the State of Mississippi and that in fact the period of exclusive jurisdiction by the State of Mississippi has run from 1881 to the present time.

Accordingly, the Court finds that if the land be not in the State of Mississippi because of the thalweg boundary that the land is in the State of Mississippi under the doctrine of acquiescence.

The third position taken by the Plaintiffs was that [p. 27] under the Doctrine of Lost Grant that Louisiana had lost title to or claim over Stack Island. The Plaintiffs' attorney in closing argument conceded that the Doctrine of Lost Grant is not applicable to the placing of state line but might be applicable to the issue of adverse possession which will remain after this ruling of this Court.

This concludes the findings of fact and conclusions of law in regard to this bifurcated portion of the trial. The Court at this time will ask the attorneys for the parties whether anyone requests a clarification of this ruling or addition to this ruling.

MR. BAILESS: No, Your Honor.

MR. KEYSER: Judge, we think you have covered everything.

THE COURT: All right. Mr. Adams, do you agree with that?

MR. ADAMS: Yes, sir.

THE COURT: All right. And Ms. Wetherbee, anything?

MS. WETHERBEE: Nothing, Your Honor.

THE COURT: All right. That will be the ruling of the Court in regard to this portion of the trial.

Let's go off the record here at this time.

(Off the record.)

THE COURT: The Court has asked the attorneys to [p. 28] consult with the Courtroom Deputy for the Court about agreeable time for the next portion of this trial. All other issues will be tried at that time.

Is there anything further for the record this afternoon?

MR. KEYSER: No, Your Honor.

MR. BAILESS: Your Honor, we have some pending motions and things and motions taken under advisement and I assume the Court wants to save all of those for the next hearing or are we going to try to rule on them sometime between now and then?

THE COURT: If you need them ruled on between now and then I will certainly consider doing that for you. Why don't you check over your hand and see where you stand. If making rulings between now and then would expedite the next hearing, that will be fine. If it is going to be the same amount of time we can simply make those rulings at the front end of the next portion of the trial.

MR. BAILESS: Thank you, Your Honor.

THE COURT: All right. If there is nothing further, then we will stand in recess.

(Recess.)

* * *

CERTIFICATE

[p. 29] I, Celeste O. McClelland, Registered Professional Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 28 pages contain a full, true, and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 29th day of June, 1989.

/s/ Celeste O. McClelland
Celeste O. McClelland

My Commission Expires:
June 29, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL PLAINTIFFS
VS. CIVIL ACTION NO. W86-0080(B)
RUTH M. THOMAS, ET AL DEFENDANTS

JUDGMENT
(Filed Jul. 3, 1989)

THIS CAUSE having come on for trial before the Court without a jury, beginning June 19, 1989 through June 23, 1989, to determine whether the property which is the subject of this litigation is located in the State in Mississippi or in the State of Louisiana, and the Court having heard testimony and argument of counsel, and at the conclusion of the hearing having rendered its ruling from the bench on June 23, 1989, and in accordance with said bench ruling, the Court finds as follows:

1. Stack Island, or Island No. 94, is located wholly within the State of Mississippi. The Patent from the United States of America was issued to Stephen B. Blackwell in 1888 describing the subject property as being located within Issaquena County, Mississippi. The parties agree that the issuance of the Patent relates back to the survey of Island No. 94, which said survey was dated August 11-12, 1881. The boundary thalweg has been defined by the United States Supreme Court in *Louisiana v. Mississippi*, 466 U.S. 96, at 100-101 (1984) as the middle of the principal channel, or, rather, the one usually followed by the downstream traffic of navigation. The boundary thalweg at the time of the 1881 survey is clearly

shown to be West of Stack Island. The survey (Exhibit P-7) shows "Good Deep Channel - No Bottom" West of Stack Island. The survey further shows a heavy caving bank on the West side of the island. The East Chute Channel shown on the survey reflects a depth of twelve (12) feet at the North end of the East Chute and shows shoals at the foot or Southerly end of the chute. Marshall's Shoreline Survey dated October-November, 1881 (Exhibit P-8) clearly shows by the positioning of the government navigation lights that the navigation course was West of Stack Island at that time. The evidence offered by the State of Louisiana, which evidence was dated later in time than the aforementioned surveys, does not prove that the boundary thalweg was in a different location at the time the patent survey was made. It is undisputed that the main navigation channel was West of Stack Island from about 1883 through 1909. In the period of approximately 1911 through 1913, an avulsive change occurred in the main navigation course at Stack Island. It is shown by Exhibit P-18 that by 1913 the Stack Island East Chute Channel had been adopted for navigation. This avulsive change in the main navigation course did not change the state boundary of the boundary thalweg, and the boundary between Mississippi and Louisiana remained in the old channel West of Stack Island. *Missouri v. Kentucky*, 11 Wall. 395, 408, 20 L.Ed. 116; *Davis v. Anderson-Tully Company*, 252 F. 681, 685 (8th Cir. 1918); *Washington v. Oregon*, 211 U.S. 127, 135, 29 S.Ct. 47, 53 L.Ed. 118.

2. The land mass known as Stack Island is the same land mass known as Stack Island, or Island No. 94, as described in the 1881 survey of the General Land Office

of the United States of America. There was always a land mass traced to the original Stack Island, also known as Island No. 94. Stack Island, through the processes of accretion and erosion, has always existed and has never disappeared. This is clearly illustrated by Exhibits P-37-A and P-37-B. It is also shown by the surveys and flood control and navigation exhibits offered by the State of Louisiana. The Court heard live testimony concerning the period from about 1930. There is no testimony that Stack Island has ever disappeared. The land mass located against the Louisiana bank of the Mississippi River is Stack Island. At all times the boundary thalweg remained on the West side of Stack Island still subject to the processes of accretion and erosion until the water in the boundary channel ceased to flow. The water in the boundary channel ceased to flow in about the year 1954, at which time the boundary thalweg became fixed. The fixed boundary thalweg is the line established and plat-
ted by Austin B. Smith in geographic positions as shown on Exhibit P-32 and as described by geodetic positions as reflected in Exhibit P-32-1.

3. The Southerly end of the lands claimed by the Plaintiffs is part of Stack Island. This land mass formed as a result of the divided flow of the Mississippi River on both sides of Stack Island by a process described by Austin B. Smith as confluence bar accretions. The land mass gradually built up by the natural processes of the Mississippi River and is accretions to Stack Island. The land mass Easterly of the fixed boundary thalweg is therefore within the State of Mississippi.

4. Additionally, the Plaintiffs and the State of Mississippi have presented the Doctrine of Acquiescence as a

basis for this Court to find that the subject property is located in the State of Mississippi. The State of Mississippi has exercised jurisdiction and sovereignty over the subject lands since 1881 by levying ad valorem taxes at least since 1889. Law enforcement on Stack Island has been provided by the State of Mississippi. Louisiana authorities have recognized that Mississippi has jurisdiction and sovereignty over Stack Island. Sam House, as sheriff of East Carroll Parish, Louisiana, carried James Kelly and Charles Shelton to Issaquena County, Mississippi in an attempt to get help from the Mississippi law enforcement authorities. The Louisiana State Police, after discovering through aerial reconnaissance a marijuana field on Stack Island, notified the Mississippi Bureau of Narcotics of the location of the marijuana field. Mississippi law enforcement officers arrested suspects in connection therewith and the suspects were prosecuted in Issaquena County, Mississippi. Act No. 191 of the Louisiana Legislature passed in 1907 does not destroy the claim of acquiescence. The said Act cannot be read to convey Stack Island in particular. The survey of the islands of the Fifth Louisiana levee District (Exhibit LA-37-A-1) does not show Stack Island and in fact the islands claimed by Louisiana and by the Fifth Louisiana Levee District are all located well South of Stack Island as it existed at that time. The State of Louisiana has, under the Doctrine of Acquiescence, acquiesced in the subject property being under the jurisdiction [sic] and sovereignty of the State of Mississippi. The 1907 Act No. 191 did not interrupt the acquiescence by the State of Louisiana. If the Court has erred in its determination that Stack Island is located in the State of Mississippi under the Rule of the Thalweg,

then this Court finds that Stack Island is located in the State of Mississippi under the Doctrine of Acquiescence.

5. The plaintiffs have conceded that the Doctrine of Presumption of Lost Grant has no application to the issue of setting the state boundary.

6. The boundary between the State of Louisiana and the State of Mississippi in the area of Stack Island, Mississippi, is described by geodetic positions of the vertexes, numbered Point 1 through Point 21, and described as follows:

Beginning at Pt. 1 at North Latitude $32^{\circ} 49' 25''$ and West Longitude $91^{\circ} 09' 27''$, said Pt. 1 being at the foot of the West bounds of Baleshed Towhead, Mississippi and the head of the West bounds of Stack Island, Mississippi, which was fixed along the thalweg of the abandoned Mississippi River Channel in about 1954, thence Southward with the fixed thalweg (marking the Mississippi-Louisiana boundary) in the abandoned sector of Lake Providence Bend channel at Pt. 2, Latitude $32^{\circ} 49'$ and Longitude $91^{\circ} 09' 34''$; thence to Pt. 3, Latitude $32^{\circ} 48' 47''$ and Longitude $91^{\circ} 09' 37''$; thence to Pt. 4, Latitude $32^{\circ} 48' 30''$ and Longitude $91^{\circ} 09' 39''$; thence to Pt. 5, Latitude $32^{\circ} 48'$ and Longitude $91^{\circ} 09' 47''$; thence to Pt. 6, Latitude $32^{\circ} 47' 18''$ and Longitude $91^{\circ} 09' 51''$; thence to Pt. 7, Latitude $32^{\circ} 47' 6''$ and Longitude $91^{\circ} 09' 54''$; thence to Pt. 8, Latitude $32^{\circ} 47'$ and Longitude $91^{\circ} 09' 59''$; thence to Pt. 9, Latitude $32^{\circ} 46' 50''$ and Longitude $91^{\circ} 10' 7''$; thence to Pt. 10, Latitude $32^{\circ} 46' 35''$ and Longitude $91^{\circ} 10' 14''$; thence to Pt. 11, Latitude $32^{\circ} 46' 20''$ and Longitude $91^{\circ} 10' 16''$; thence to Pt. 12, Latitude $32^{\circ} 46'$ and Longitude $91^{\circ} 10' 18''$; thence to Pt. 13, Latitude $32^{\circ} 45' 45''$ and Longitude $91^{\circ} 10' 20''$; thence to Pt. 14, Latitude $32^{\circ} 45' 30''$ and Longitude $91^{\circ} 10' 18''$; thence to Pt. 15, Latitude $32^{\circ} 45' 15''$ and Longitude $91^{\circ} 10' 12''$; thence to Pt. 16, Latitude 32°

$45'$ and Longitude $91^{\circ} 10' 01''$; thence to Pt. 17, Latitude $32^{\circ} 44' 45''$ and Longitude $91^{\circ} 09' 49''$; thence to Pt. 18, Latitude $32^{\circ} 44' 30''$ and Longitude $91^{\circ} 09' 38''$; thence to Pt. 19, Latitude $32^{\circ} 44' 23''$ and Longitude $91^{\circ} 09' 30''$; thence to Pt. 20, Latitude $32^{\circ} 44' 15''$ and Longitude $91^{\circ} 09' 18''$; thence to Pt. 21, Latitude $32^{\circ} 44' 07''$ and Longitude $91^{\circ} 09'$; thence to Pt. 22, Latitude $32^{\circ} 44'$ and Longitude $91^{\circ} 08' 44''$; said Pt. 21 marks 1975 downstream bounds of Stack Island fixed thalweg (Fixed Interstate Mississippi-Louisiana boundary) and the beginning of the 1975 live thalweg (Live Interstate, Mississippi-Louisiana boundary).

7. The second trial of this cause to determine all other issues not disposed of in this first trial is hereby set for October 2, 1989, at 9:00 a.m. in the Federal Courthouse at Vicksburg, Mississippi.

SO ORDERED AND ADJUDGED, this 3rd day of July, 1989.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL

PLAINTIFFS,

V. CIVIL ACTION NO. W86-0080(B)

RUTH M. THOMAS, ET AL

DEFENDANTS.

BENCH OPINION

BEFORE: THE HONORABLE
WILLIAM H. BARBOUR, JR.,
UNITED STATES DISTRICT JUDGE

DATE: OCTOBER 2, 1989

PLACE: VICKSBURG, MISSISSIPPI

APPEARANCES:

COUNSEL FOR PLAINTIFFS:
MR. ROBERT R. BAILESS
MR. M. E. WARD

COUNSEL FOR INTERVENORS:
MR. GARY L. KEYSER
MR. CALVIN ADAMS

COURT REPORTER:
MS. CELESTE O. McCLELLAND, RPR
245 E. CAPITOL, ROOM 534
JACKSON, MISSISSIPPI 39201
(601) 965-5135

[p. 2] THE COURT: The Court has heard the evidence presented by all parties in regard to this matter and is now prepared to enter its findings of fact and conclusions of law by way of this bench opinion.

This Court had before it by virtue of the complaint to remove cloud, originally filed in this case by the Houston Plaintiffs, a possession issue. The Defendants were the riparian owners on the Louisiana side of the Mississippi River adjacent to what has been referred to in this case as Stack Island. Some of those Defendants moved to expand the basic questions of the lawsuit to a state boundary dispute between the State of Mississippi and the State of Louisiana and those two states were joined as parties.

The Lake Providence Port Commission was a riparian owner. As the Court recollects the Lake Providence Port Commission is an entity of the State of Louisiana and, accordingly, the State of Louisiana undertook representation of the Lake Providence Port Commission.

Also eventually joined in the lawsuit was the Fifth Louisiana Levee District, which is responsible for the Mississippi River levees as well as other levees along the Lake Providence reach of the Mississippi River as well as in other areas.

The Court earlier this year bifurcated the trial of this case and heard the state boundary issue. The Court decided [p. 3] that issue favorably to the State of Mississippi and the Houston Plaintiffs deciding that Stack Island was a part of the State of Mississippi and as a part of that ruling set the boundary line between the State of Louisiana and the State of Mississippi along the west side of the area known as Stack Island.

The Court did this for reasons of jurisdiction and state law. If the Court had decided that the land mass was a part of Louisiana, the Court had concluded that the case would be more properly tried on the possessory title

issues in the Federal Courts for the State of Louisiana under Louisiana law.

When the Court decided that the property was in Mississippi, the Court determined that this Court has the jurisdiction to decide the property interest on diversity of citizenship jurisdiction and because the property is in Mississippi will apply Mississippi law to the decision as to who owns the property. The decision as to ownership of the property of course will quiet title to it.

By way of further background, this land mass has been subject to other litigation. The Court has heard proof today from Ms. Elizabeth Reed that at some point she and her mother sold some timber to the United States Gypsum Company. Timber cutting on Stack Island was the subject of successful litigation on behalf of the Houstons earlier in which it was [p. 4] determined that the Houstons had title to the island rather than United States Gypsum. Also the Houstons have litigated title to this property in the Chancery Court of Issaquena County, Mississippi, and a final decree was entered by that Court on May 7, 1968, in effect adjudging that the island was owned by the Houstons and that the Defendants named in that lawsuit had no claim to it. The Court is not sure as to the binding effect of that lawsuit and to the need for the Plaintiffs to bring this lawsuit in the face of the decision in that one. However, in the interest of settling all the issues in regard to this tract of land, both possessory and in regard to the location as to whether it is in Mississippi or Louisiana, the Court urged and probably even required that the attorneys for the Houstons include all persons who might have any claim to the property in this lawsuit.

The Court notes in this regard that under Louisiana law riparian owners own to the edge of the main river including any accretions and islands in the Louisiana portions of the river are owned by the State of Louisiana. Under Mississippi law the adjacent land owners own the islands in the Mississippi portion of the river.

The Defendant Louisiana riparian owners who filed answers and counterclaims took the legal position under Louisiana law that Stack Island had become an accretion to their east bank and that they, accordingly, have acquired [p. 5] title by accretion over time out to the edge of the main river.

The decision of the Court in the first phase of this hearing in ruling that Stack Island was an island which had migrated down-stream and to the west in which the Court set the state boundary line between the island and the Louisiana bank, in effect, eliminated the riparian owners' claims to the island under the Louisiana doctrines of accretion.

This, accordingly, leaves for the Court the question as to whether the ownership of the land known as Stack Island which is legally titled to the Houston interests has been subjected to any adverse possession by any Louisiana riparian owners.

At this point the Court notes that as a result of this lawsuit, most of the riparian owners west of Stack Island have deeded their interests in Stack Island to the Lake Providence Port Commission. The Lake Providence Port Commission operates a port facility near the south end of Stack Island which is divided from Stack Island by what

is known as the Port Commission Chute. That chute is kept open by dredging at this time.

The parties agreed in the face of the clear proof that legal title to Stack Island was in the name of the Houston interest. Accordingly, the parties agreed that the burden of proving any adverse possession under Mississippi law lay upon [p. 6] the adverse claimants. The adverse claimants in this case were the State of Louisiana and the Lake Providence Port Commission. The Lake Providence Port Commission claims under the same theory previously explained by the Court on the basis that itself is a riparian owner to accreted land lying directly east of the Port Commission property which is across the chute from the south end of Stack Island.

The Port Commission also claims as successor in interest to the riparian owners lying west of the island by virtue of numerous quitclaim deeds which have been obtained by the Port Commission from the various riparian owners the rest of Stack Island.

Accordingly, the State of Louisiana and the Lake Providence Port Commission proceeded with their proof here today in regard to adverse possession. Several witnesses were presented. Ms. Elizabeth Reed testified that she and her family had owned a plantation, which was marked on Louisiana Exhibit 1-A, and that she and her family had claimed to the water's edge. In support of her testimony, she testified that she had sold timber to United States Gypsum and had entered into a lease for all lands east of the levee.

The Court also notes that she testified that her father, Vail Deloney, had engaged in a sand and gravel operation

by excavating in the chute between the river bank and the island [p. 7] for many years prior to her father's death in 1967. The Court notes that this witness never testified to any possession east of the line which the Court has established as the state boundary.

Next, the State of Louisiana and the Port Commission called Ms. Vail Deloney, the mother of Ms. Reed. Ms. Deloney basically only testified that she had been hunting one time on the island with her husband in the 1930's.

Next, the State and the Port Commission called a Federal Fish and Wildlife Officer, Mr. Oliveros, who testified that he had written tickets for Federal violations and prosecuted them in the Louisiana Federal Court. This reportedly was offered to show that Mississippi had acquiesced in the jurisdiction of Louisiana on these lands. The Court, however, takes this testimony merely to show that the Federal authorities took these cases to Federal Court in Louisiana and Mississippi had nothing to do with them one way or the other.

Next, the State and Port Commission called two State of Louisiana Wildlife and Fisheries Enforcement Officers or Game Wardens who testified that they had hunted on Stack Island as boys, that they had each written some tickets for game offenders on the island and taken the violators either to Federal Court in the State of Louisiana or State Court in Louisiana. Both also testified they had never seen [p. 8] Mississippi game agents on the island, that they had never seen any of the Houstons or any other people from Mississippi on the island, and that they had never seen any posted signs on the island.

The Court understands the purpose of this testimony to be both that the State of Mississippi had acquiesced in the jurisdiction of Louisiana and to offset or contradict some of the other testimony which had previously been offered by the Houston Plaintiffs in regard to posting and possession by the Houstons.

The Court notes that neither of these witnesses, Murray nor Chatman, testified as to any possession by anybody specific and, accordingly, finds that their testimony is not very probative.

Finally, the State of Louisiana and Port Commission called Billy Jack Murray, who basically stated that he had hunted a number of times 12 to 15 years ago with people who were from Louisiana. He had hunted on Stack Island as well as on the unprotected side of the levee, but, again, never testified as to any specific adverse claimants of the island itself.

Accordingly, the Court would have found, if it had been asked to do so on the basis of that proof by way of a motion for directed verdict, that the State of Louisiana and the Louisiana Port Commission had failed to carry their burden of [p. 9] proof and present any substantial evidence whatsoever as to any adverse claim by any particular party.

The Court further would note that there was no statement of claim to a particular part of the property except by Ms. Reed who merely extended her property lines eastward to cover the island.

No motion for directed verdict was made by the Houstons and so, accordingly, the court will go forward

and assess the rest of the evidence which was adopted by the Houstons through the earlier testimony given to the Court.

There were a number of witnesses who testified in the first hearing of this case, all to the effect that this property has been claimed and possessed by the Houstons for many years. Jelly Higgins testified that as far back as the late 1950's and early 1960's that he and his father had run cattle on the island pursuant to various letters of authorization and grazing leases from the Houstons and that these leases covered the entire land. Mr. Higgins also testified that in the late Fifties and early Sixties that the Houstons had planted cottonwood trees on portions of Stack Island, and that between 1962 and 1970 Jelly Higgins had run trespassing hunters off of the island as well as kept the island posted, all under the authorization of Ted Houston who was managing the property for the Houston interest.

Charles Shelton testified that he had hunted on the [p. 10] island as a boy, receiving permission to hunt from Jelly Higgins' father. He also stated that he was the president of the Stack Island Hunting Club beginning in 1970, that the island was leased for the hunting club purposes from the Houstons and that the hunting club posted it every year pursuant to that lease.

He and James Kelly testified as to putting up a fence that Sam House wanted. This was to a small portion of the land on the island lying east of the high bank on the Louisiana side. Sam House was the riparian owner west of that particular property.

The Court has heard no other claim from Mr. House as to this property and does not think that the putting up of the fence by the hunting club owners would be sufficient to establish an open, adverse, notorious, continuous, and uninterrupted possession of any portion of the island by Sam House.

The Court notes, although it does not so consider, that Mr. Keyser in his offer of proof in regard to Mr. House's testimony that Mr. House would have testified that he himself had taken the fence down.

Mr. Kelly confirmed that he had seen cottonwood planters on the island as a boy. Ralph Polk testified that the cottonwood planters were hired by the Houstons and that he regularly took Ted Houston to the island for inspection [p. 11] during some of the low water season by way of tractor.

Mr. Jarvis testified that he was the land manager at the present time for the Houston interest and that in 1985 he had leased the entire island to Captan Jack Wyly.

Horsefly Higgins testified that he had leased all of Stack Island from the Houstons and he had been represented in that transaction by Mr. Wyly, who is an attorney. Mr. Wyly testified that he had leased all of the island from the Houstons for the Stack Island Hunting Club and that he himself as a riparian owner did not claim any Mississippi land.

The only other testimony which the Court has considered relevant from the first trial was that of Randy Walters, the Port Commission Director, who testified that the Port Commission had dredged in the Lake Providence

port chute between the port and the lower end of Stack Island to keep that channel open, and that barges in and out of the port facility had been tied up against the east bank of the chute which would be next to the south portion of Stack Island. The Court does not think that that establishes any possessory right or interest in the Port Commission specifically or in any other parties.

Accordingly, the Court concludes as a matter of law that the Houston Plaintiffs are the record title owners to Stack Island, being that land mass lying east of the state boundary [p. 12] established by this Court in the bench opinion following the first phase of this trial.

And, further, that the State of Louisiana, the Lake Providence Port Commission, the Fifth Louisiana Levee District, and any other Defendants have failed to make any showing as to any open, adverse, notorious, continuous and uninterrupted possession of any part of that land mass for ten years or more as required by Mississippi law.

Accordingly, the Houston Plaintiffs are entitled to a final judgment setting forth their ownership of the island and quieting title to that entire land mass in their names.

The Court earlier announced that it was taking certain motions under advisement: One being a motion to strike the counterclaims of the Defendants, which was filed on behalf of the Houston Plaintiffs; another motion filed by the State of Louisiana and the Lake Providence Port Commission moving to substitute the State of Louisiana and the Lake Providence Port Commission as the

parties and interest in this suit in place of the quitclaiming riparian owners; and a motion by the State of Louisiana and the Lake Providence Port Commission to set aside the default judgments taken against the riparian owners.

These three motions are intertwined with the defenses of the original riparian Defendants to the Plaintiffs' motion for Rule 11 sanctions in which Plaintiffs claim that the [p. 13] riparian owners who were joined as Defendants should be assessed attorneys fees and costs. Mr. Fox represented a group of those parties. Mr. Wyly represented himself and others. A third group of riparian owner Defendants never appeared in the lawsuit one way or the other and suffered default.

In regard to those who who [sic] never appeared and suffered default, the State's motion to set aside those default judgments if in fact it goes to those defendants is denied.

In regard to the Rule 11 sanctions motion, Mr. Fox argued, and Mr. Wyly in effect adopted the same position, that Mr. Fox had filed on behalf of his clients a motion to dismiss and that that motion to dismiss was not ruled upon by the Court until the case was originally set for trial on March 21, 1988. At that time, defaults had been entered against certain parties including Mr. Fox's clients.

The Court, in attempting to get all issues involving this land before it, made certain rulings at that time including a ruling which attempted to bring into Court all parties who wished to be in Court. The Court directed the defaulting Defendants to show cause within ten days

as to why they should not suffer default. The Court also at that time overruled or denied the motion to dismiss. Mr. Fox has argued to the Court and has presented witnesses that the position of his clients was that under the Federal Rules he [p. 14] was not required to answer until ten days after the motion to dismiss had been ruled upon and that his clients did so by filing an answer and counterclaim at that time.

Mr. Wyly in effect took the same position except in regard to one of his clients, Mr. Albert Surles, that Mr. Surles had appeared pro se and by way of a letter written to the Court stated that he had no interest in the property being considered by the Court.

The Court can see where the named Defendants who were attempting to appear were procedurally confused. Accordingly, the motion to strike the counterclaims of those Defendants on the basis that they were not timely filed is denied.

Also the motion of the State of Louisiana and the Lake Providence Port Commission to set aside the default judgments as to any of the parties who filed answers after March 21, 1989, is granted.

The Court also will allow the substitution of the State of Louisiana and the Lake Providence Port Commission in the place and stead of those parties who have appeared in this Court in one way or the other, and had thereafter quitclaimed their interest to the Lake Providence Port Commission.

The Court in considering Rule 11 sanctions must consider that the signature of an attorney or party constitutes a certificate by the signer that the signer has read the [p. 15] pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, that the position taken therein is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose such as unnecessary delay or to increase the cost of litigation.

The Court finds that the motion for Rule 11 sanctions is not well taken. Those Defendants who filed the motion to dismiss and thereafter filed an answer and counterclaim, were in good faith relying upon a position well founded in law, that if the Court had determined that the boundary line between the State of Mississippi and the State of Louisiana was on the east side of the island rather than the west side of the island, then the riparian owners on the Louisiana side would have a valid claim to the property. Under those circumstances it would be the Houstons who would be asserting title by adverse possession rather than record title to the property.

Accordingly, the Court finds that the position taken by those parties was not unreasonable under law or fact, that this case was a question in which serious factual issues were presented, that if those factual issues had been decided in the other way that a completely different set of laws would [p. 16] have been applied and, accordingly, that the parties were entitled to take the positions that they did without incurring Rule 11 sanctions. The motion for Rule 11 sanctions is denied.

The Court, accordingly, will enter a final judgment adjudicating the Houstons to be the sole owners of Stack Island, that it lies in Mississippi, and that the title thereto is quieted as against all of the parties in the lawsuit opposed to the Houstons.

Because of the complexity of the legal description, I will ask Mr. Bailess as the prevailing party to prepare a proposed final judgment including whatever you feel is necessary to place in your judgment for title purposes. You may make any necessary statement which will make that judgment recordable for land deed purposes.

I will ask that the judgment be presented to the attorneys opposite for criticism or comment before it is presented to the Court.

The Court did not specifically address Mr. Sedrick Banks, the successor to Bess Purdy, deceased. The Court notes that Mr. Bailess on behalf of the Houstons apparently conceded that Rule 11 sanctions would not be properly assessed against that succession or estate.

That will conclude the bench opinion by the Court.

I will ask the parties represented as to whether there [p. 17] is any request for additional adjudication by the Court or clarification of any ruling by the Court.

Mr. Bailess for the Houstons?

MR. BAILESS: Your Honor, if the Court please, you covered a great deal. I think I understand what the Court did. I can't think of anything right now.

One small point of clarification. Which attorneys do I have to run this order by?

THE COURT: All right.

MR. BAILESS: Would it be Mr. Keyser and Mr. Adams? Or do I also need to run it by Mr. Fox and Mr. Wyly and Mr. Banks?

THE COURT: Is there any request from either Mr. Banks, Mr. Fox, or Mr. Wyly to review the judgment?

MR. BANKS: No, sir, I'd waive any request of succession that Bess Purdy may have.

MR. FOX: No, Your Honor.

MR. WYLY: No, Your Honor.

THE COURT: All right.

MR. WYLY: I would like to ask one thing.

THE COURT: Just a minute. Let me take this in order.

Mr. Bailess, you will only be required to submit it to Mr. Keyser and Mr. Adams. The other attorneys do not wish you to submit it to them.

[p. 18] MR. BAILESS: Thank you, Your Honor. One thing that either I am confused about or the Court was confused about is the motion to set aside the default judgment. And I think that the only motion that was filed to set aside a default judgment was filed by Mr. Wyly on behalf of Mr. Surles, Gladstone Corporation, and the Wyly interests. I could be wrong about that.

MR. WYLY: According to if it's in order, I ask that those motion [sic] to be set aside be withdrawn.

THE COURT: Would you simply withdraw those motions?

MR. WYLY: Yes, sir.

THE COURT: All right. The withdrawal -

MR. WYLY: That will clarify his problem; will it not?

THE COURT: Yes, sir, the withdrawal of those motions will be permitted and that will render moot the motion to set aside. I had understood in our telephone conversation last week between Mr. Bailess and Mr. Keyser that there had been a motion by Mr. Keyser on behalf of his clients to set aside default judgments; is that not true?

MR. BAILESS: No, Your Honor. I was just informing the Court that that was one motion that had been filed but which had never been disposed of. It was actually filed by Mr. Wyly.

[p. 19] THE COURT: I have granted that withdrawal and that moots that issue. Accordingly, the Court simply states that the comments made in the bench opinion concerning the motion to set aside the default judgments is deleted. They will not actually be taken out of the transcript but it should be considered as though they had not been mentioned.

MR. BAILESS: Thank you, Your Honor.

THE COURT: All right. Mr. Keyser, any request for additions or clarifications?

MR. KEYSER: No, sir. I don't have any.

THE COURT: Mr. Adams?

MR. ADAMS: No, sir.

THE COURT: All right. Mr. Wyly?

MR. WYLY: I would like to ask if the Court would have the boundaries marked so that all parties concerned, the line and the boundaries will be marked.

THE COURT: All right. Mr. Wyly. I will decline that request. I think that it is up to the land owners to mark a boundary and that the Court should not require that to be done. The Court has ruled in the first phase of this trial as to the exact geographical calls constituting that boundary. And if at the conclusion of these proceedings some party wishes to expend the money to have a surveyor mark that boundary in accordance with those calls, certainly whoever wishes that done can do so. I will not require that.

[p. 20] All right, Mr. Banks?

MR. BANKS: Your Honor, I'm kind of a small fish in a big pond here, but the best I can figure it out, the succession has some three or four acres interest in this island that was in dispute. My question would be, has the Court determined what costs, if any, the Defendants are liable for?

THE COURT: I have not but I will address that in just a moment.

Mr. Fox, any request for clarification or additions from your clients?

MR. FOX: No, Your Honor.

THE COURT: All right. Let me address the issue of costs. I'm sure that Mr. Bailess as the prevailing party is interested in that.

This Court understands that in the matter of costs in Federal Court that there is considerable discretion on the Judge's part as to which costs to assess to a prevailing party. Normally the only costs which I assess are the filing fees and any witness costs that were actually expended for subpoenaed witnesses. I do not normally allow as costs things that appear on the printed costs bill for depositions, costs of copies, and such matters as that.

I would suggest to everyone that probably the most equitable way to assess costs under the circumstances would [p. 21] be to assess them against the State of Louisiana and the Lake Providence Port Commission as the primary parties who were protesting the lawsuit, particularly in regard to the positions taken by the individual Defendants that basically once the litigation started they turned their interests over to the State of Louisiana.

Accordingly, the Court will assess the costs in favor of the Plaintiffs only against the State of Louisiana and the Lake Providence Port Commission.

And then, Mr. Bailess, you may be guided by my remarks in regard to whatever costs you might wish to claim. I will not rule on that at this time. You may make your claim by a proper bill of costs in any form or fashion that you wish. I will rule on that at a later point if called upon so to do.

All right. Anything further from anybody?

The Deputy Clerk was missing a couple of exhibits in the record. I understand that she called you, Mr. Keyser. I believe they were Louisiana exhibits.

MR. KEYSER: Yes, sir. We had talked about it earlier today. She's still missing Louisiana 20 and 30 and I had assumed she had found them when I hadn't heard back from her and I didn't find them in my stuff. I will endeavor to get copies of them.

THE COURT: You need to have the record complete, particularly if someone wishes to take an appeal. She did [p. 22] not have those after the last hearing. We had a large number of exhibits and it was fairly complicated.

Mr. Keyser, let me ask you to be responsible either for finding those original exhibits or providing us with copies.

MR. KEYSER: Yes, sir.

THE COURT: All right. I will ask the attorneys before we leave this afternoon to please help the Courtroom Deputy with the exhibits to make sure while you are all here that the exhibits are in proper order.

The Court has made this bench opinion. In the event it is transcribed for appeal or other purposes, the Court will reserve the right to edit or amend this bench opinion. The Court, however, will not change the end results of the opinion by any such editing or amending.

If there is nothing further then the Court will stand in recess.

(Recess.)

[p. 23] * * *

CERTIFICATE

I, Celeste O. McClelland, Registered Professional Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 22 pages contain a full, true, and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 13th day of October, 1989.

/s/ Celeste O. McClelland
Celeste O. McClelland

My Commission Expires:
June 29, 1991

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, RUTH HOUSTON
BAKER and HINES H. BAKER, JR., CO-EXECUTORS
AND CO-TRUSTEES OF THE ESTATE OF GEORGE T.
HOUSTON a/k/a GEORGE T. HOUSTON, III,
DECEASED; AND RUTH HOUSTON BAKER,
INDIVIDUALLY

PLAINTIFFS

VS. CIVIL ACTION NO. W86-0080(B)

RUTH M. THOMAS, DECEASED; BESSIE PRICE
TALBERT PURDY, DECEASED; MRS. EDITH P.
HOUSTON; EDMOND SUSAN BELL FOLK; SARAH
ANN SCHNEIDER BOTKIN; SARA ANN SCHNEIDER
MOTT; FREDERICK HALL SCHNEIDER, III; GAY
SCHNEIDER WARREN; NANETTE SCHNEIDER
MILLER; LISA M. MILLER; OWEN S. BROWN, JR.;
MARY VIRGINIA BROWN; WILLIAM F. NAFF; JOHN
O. NELSON, JR.; TOM ED NELSON; ALBERT P.
SURLES, JR.; WALTER ELVIS SURLES; ALBERT P.
SURLES; HAZEL T. WHITE; ELIZABETH DELONEY
REED; VAIL DELONY BALDRIDGE; ELIZABETH
LOUISE MILLER DELONEY, ADMINISTRATRIX OF
THE SUCCESSION OF VAIL M DELONY; GENEVIEVE
BROWN SHORTER, DECEASED; CHARLIE BUTLER;
BETTYE JOE SHORTER PRINCE; FRED ROGERS
SHORTER; WILLIE B. SHORTER; EDWARD LEO
SHORTER; SAM L. HOUSE, JR.; MILDRED A. HOUSE;
SAM THOMAS BATTON; AUDREY H. BATTON;
GLADSTONE CORPORATION; ANNIE ROSE W.
GILFOIL; JAMES HENRY GILFOIL, III; WILLIAM D.
BROWN, III; GRADY WYLY BROWN; PHILIP B.
BROWN; JAMES GRADY WYLY, JR.; ANNIE ETHEL
WYLY; WILLIAM NORRIS WYLY; BONNIE G. WYLY;

HOLLYBROOK LAND COMPANY, INCORPORATED;
ED M. LOWRANCE, TRUSTEE FOR HELEN C.
LOWRANCE; HELEN C. LOWRANCE; OGDEN
RUSSELL; KATHLEEN P. RUSSELL, DECEASED;
FEDERAL DEPOSIT INSURANCE CORPORATION;
THE UNKNOWN HEIRS AT LAW OR DEVISEES OF
SAM ERNEST SHORTER; THE UNKNOWN HEIRS AT
LAW OR DEVISEES OF SAM EARL SHORTER; THE
UNKNOWN HEIRS AT LAW OR DEVISEES OF SAM
SHORTER, JR.; THE UNKNOWN HEIRS AT LAW OR
DEVISEES OF ELLA N. BELL; NATHANIEL W.
THOMAS; FRANK M. THOMAS; COLLINS S.
THOMAS; SAM DONALD JR., EXECUTOR OF THE
SUCCESSION OF BESSIE PRICE TALBERT PURDY;
MARTHA CECILIA RUSSELL REED, INDIVIDUALLY
AND AS CO-GUARDIAN OF THE PERSON AND
ESTATE OF OGDEN "SONNY" RUSSELL; LYNN
OGDEN RUSSELL, INDIVIDUALLY AND AS CO-
GUARDIAN OF THE PERSON AND ESTATE OF
OGDEN "SONNY" RUSSELL; BOARD OF
COMMISSIONERS FOR THE FIFTH LOUISIANA
LEVEE DISTRICT

DEFENDANTS

STATE OF LOUISIANA AND
LAKE PROVIDENCE PORT COMMISSION

INTERVENORS
AND THIRD PARTY PLAINTIFF

STATE OF MISSISSIPPI

THIRD PARTY DEFENDANT

JUDGMENT

(Filed Dec. 13, 1989)

THIS CAUSE having come on for trial before the
Court without a jury on October 2, 1989, this hearing

being the second phase of the trial of this cause, the trial being bifurcated by the Court to first determine whether the property which is the subject of this litigation is located within in the State of Mississippi or in the State of Louisiana, to determine whether or not this Court had jurisdiction of the property, and to determine the application of state law. This Court has previously determined in the earlier hearing that the property which is the subject of this litigation is located in the State of Mississippi. The Court has heard testimony and argument of counsel in this the second and final phase of this litigation, and at the conclusion of said hearing, the court rendered its ruling from the bench on October 2, 1989, and in accordance with said bench ruling, the Court finds as follows:

1. This Court had earlier ruled that the property known as Stack Island moved downstream and to the West by virtue of the natural processes of the Mississippi River. This action eliminated the claim that the subject property constituted accretions of the State of Louisiana. Having so ruled, the only issue left to be decided by this Court is that of adverse possession of the property known as Stack Island.

2. Legal title to the subject property is in the name of Plaintiffs. All parties have agreed that the burden of proof is on the Louisiana riparian owners to prove any title they may have by adverse possession.

3. The Court has heard testimony from Elizabeth D. Reed, Mrs. Vail Deloney, Joe Oliveros, Mike Murray, Joe Chapman and Billy Murray. The testimony offered by the Defendants, Intervenor does not meet the burden of proof required of them. There is no testimony of any

adverse possession East of the State boundary line as set by this Court. In order to prove adverse possession, the Defendants and Intervenor were required to prove possession that is hostile and under claim of right, actual, open, notorious and visible, exclusive, continuous and uninterrupted and peaceful.

4. At the earlier hearing of this cause in June, 1989, the Plaintiffs offered proof of possession of the subject property by the Plaintiffs as follows:

(a) Eyreal "Jelly" Higgins testified that he grazed cattle on Stack Island and observed that the Houstons had planted cottonwood trees. Jelly Higgins kept trespassers off of Stack Island and kept the property posted.

(b) Charles Shelton testified that he hunted on Stack Island as a boy. Further, he kept Stack Island posted as president of the hunting club on Stack Island.

(c) James Kelly confirmed that the Houstons planted cottonwood trees on Stack Island.

(d) Ralph Polk testified that he saw the Houstons on Stack Island and on several occasions transported Ted Houston to Stack Island.

(e) A. M. "Horsefly" Higgins testified that in the 1950's he leased all of Stack Island for grazing purposes. He was represented by attorney Captan Jack Wyly in executing this grazing lease on Stack Island. Captan Jack Wyly testified that as a Louisiana riparian owner he claimed no Mississippi land.

The State of Louisiana and the Lake Providence Port Commission offered as a witness Randy Walters, the

Executive Director of the Lake Providence Port Commission, who testified that dredging was done in the Hagan Chute to keep the Port Commission channel open. He also testified that barges tied to the east bank of the Chute. This testimony does not establish any possessory rights in the Lake Providence Port Commission.

5. The Plaintiffs are the record title owners of Stack Island being that part east of the state boundary line as set by the Court by Judgment dated July 3, 1989.

6. No Defendant or Intervenor has met the burden of proof to establish any property rights in Stack Island.

7. The Plaintiffs are entitled to final judgment quieting title to Stack Island.

8. The Plaintiffs' Motions to Strike Counterclaims of the various Defendants are denied.

9. The Motions for Substitution of Parties as filed by the State of Louisiana and the Lake Providence Port Commission are granted.

10. The Plaintiffs' Motions for Sanctions are denied.

11. All court costs are assessed against the State of Louisiana and the Lake Providence Port Commission, for which Plaintiffs may make claim by proper bill of costs.

12. Judgment is hereby entered adjudicating that:

(a) Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr. as Trustees of the Julia Donelson Houston Marital Trust are the fee simple owners of an undivided three-sixteenths ($\frac{3}{16}$) interest, and that Julia Donelson Houston, Ruth Houston Baker and Hines H.

Baker, Jr. as Trustees of the George T. Houston Estate Trust are the fee simple owners of an undivided nine-sixteenths ($\frac{9}{16}$) interest, and that Ruth Houston Baker is the fee simple owner of an undivided one-fourth ($\frac{1}{4}$) interest in and to the property hereinafter described lying North of the North line extended Westward of that certain tract of land known as "Shipland"; and

(b) Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr. as Trustees of the Julia Donelson Houston Marital Trust are the fee simple owners of an undivided one-eighth ($\frac{1}{8}$) and that Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr. as Trustees of the George T. Houston Estate Trust are the fee simple owners of an undivided three-eighths ($\frac{3}{8}$) interest each in and to only the oil, gas and other minerals lying in, on and under the land hereinafter described, lying South of the North line extended Westward of the certain tract of land known as "Shipland"; and

(c) Ruth Houston Baker is the fee simple owner of the lands hereinafter described lying South of the North line extended Westward of that certain tract of land known as "Shipland", subject to the ownership of an undivided one-half ($\frac{1}{2}$) interest [described above in 12(b)] in and to the oil, gas and other minerals lying in, on and under said property.

Further, this Court finds that none of the Defendants or Intervenor have any right, title or interest in said lands and this Court removes and cancels all clouds heretofore existing on the title of Plaintiffs in and to said property as against all claims of the Defendants and Intervenor.

13. The property of Plaintiffs is described as follows, to-wit:

That certain island in the Mississippi River known as Island No. 94 and also known as Stack Island, being sometimes also called Section 27 of Township 11 North, Range 9 West, Issaquena County, Mississippi, being the same island, with accretions which have been added thereto, which was conveyed by the United States of America to Stephen B. Blackwell by Patent dated December 29, 1888 and recorded in Book S at Page 444 of the Land Records of Issaquena County, Mississippi. The West boundary of said lands, which is also the East boundary of the lands in the State of Louisiana, is described by geodetic positions of the vertexes, numbered Point 1 through Point 21, and described as follows:

Beginning at Pt. 1 at North Latitude 32° 49' 25" and West Longitude 91° 09' 27", said Pt. 1 being at the foot of the West bounds of Baleshed Towhead, Mississippi and the head of the West bounds of Stack Island, Mississippi, which was fixed along the thalweg of the abandoned Mississippi River Channel in about 1954, thence Southward with the fixed thalweg (marking the Mississippi - Louisiana boundary) in the abandoned sector of Lake Providence Bend channel at Pt. 2, Latitude 32° 49' and Longitude 91° 09' 34"; thence to Pt. 3, Latitude 32° 48' 47" and Longitude 91° 09' 37"; thence to Pt. 4, Latitude 32° 48' 30" and Longitude 91° 09' 39"; thence to Pt. 5, Latitude 32° 48' and Longitude 91° 09' 47"; thence to Pt. 6, Latitude 32° 47' 18" and Longitude 91° 09' 51"; thence to Pt. 7, Latitude 32° 47' 6" and Longitude 91° 09' 54"; thence to Pt. 8, Latitude 32° 47' and Longitude 91° 09' 59"; thence to Pt. 9, Latitude 32° 46' 50" and Longitude 91° 10' 7"; thence to Pt. 10, Latitude 32° 46' 35" and Longitude 91° 10' 14"; thence to Pt. 11, Latitude 32° 46' 20" and Longitude 91° 10' 16";

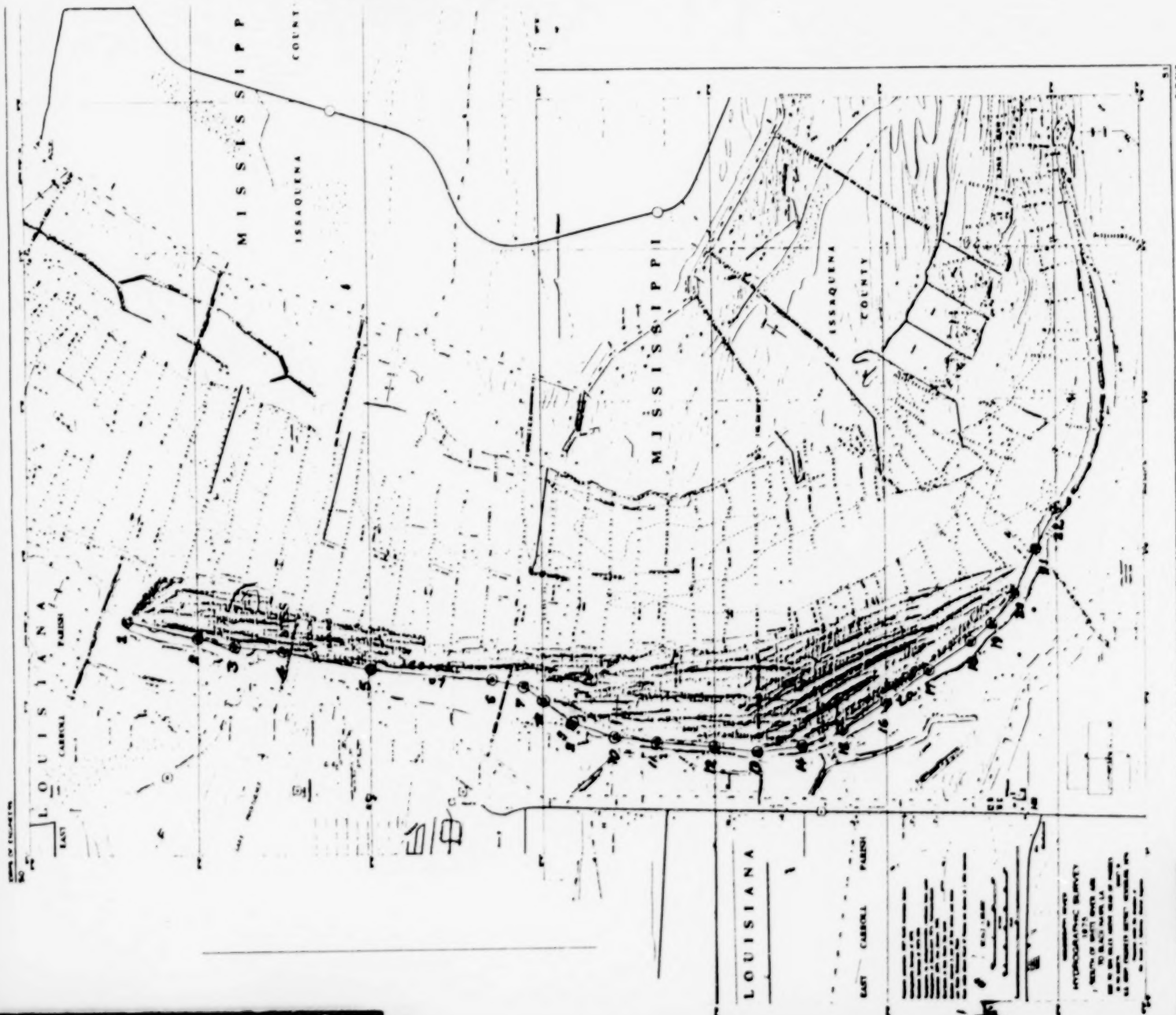
thence to Pt. 12, Latitude 32° 46' and Longitude 91° 10' 18"; thence to Pt. 13, Latitude 32° 45' 45" and Longitude 91° 10' 20"; thence to Pt. 14, Latitude 32° 45' 30" and Longitude 91° 10' 18"; thence to Pt. 15, Latitude 32° 45' 15" and Longitude 91° 10' 12"; thence to Pt. 16, Latitude 32° 45' and Longitude 91° 10' 01"; thence to Pt. 17, Latitude 32° 44' 45" and Longitude 91° 09' 49"; thence to Pt. 18, Latitude 32° 44' 30" and Longitude 91° 09' 38"; thence to Pt. 19, Latitude 32° 44' 23" and Longitude 91° 09' 30"; thence to Pt. 20, Latitude 32° 44' 15" and Longitude 91° 09' 18"; thence to Pt. 21, Latitude 32° 44' 07" and Longitude 91° 09'; thence to Pt. 22, Latitude 32° 44' and Longitude 91° 08' 44"; said Pt. 21 marks 1975 downstream bounds of Stack Island fixed thalweg (Fixed Interstate Mississippi - Louisiana boundary) and the beginning of the 1975 live thalweg (Live Interstate, Mississippi - Louisiana boundary).

14. This Judgment, along with a copy of the plat of Exhibit P-32D, which said Exhibit P-32D is attached to this Judgment as Appendix A, may be recorded in the Land Records of Issaquena County, Mississippi and in the office of the Clerk of Court of East Carroll Parish, Louisiana.

SO ORDERED AND ADJUDGED, the 13 day of Dec., 1989.

s/ William H. Barbour, Jr.
UNITED STATES
DISTRICT JUDGE

APPENDIX "A"



No. [114] Original

**In the
Supreme Court of the United States**

October Term, 1988

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, ET AL.,

Defendants.

**MOTION TO FILE COMPLAINT, COMPLAINT
AND APPLICATION FOR STAY ORDER,
AND BRIEF IN SUPPORT OF MOTION,
COMPLAINT AND APPLICATION FOR
STAY ORDER**

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
State Capitol
Baton Rouge, Louisiana 70804

**GARY L. KEYSER
DAVID C. KIMMEL**
Assistant Attorneys General
State of Louisiana

No. [114] Original
In The
Supreme Court of the United States
 October Term, 1988

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, ET AL.,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT
AND FOR STAY ORDER

The State of Louisiana, appearing herein through the Honorable William J. Guste, Jr., its Attorney General, acting in pursuance of the authority and powers vested in him by Article IV, Section 8 of the Louisiana Constitution, respectfully states that:

1. A portion of the boundary between the States of Louisiana and Mississippi common to the Parish of East Carroll, Louisiana, and the County of Issaquena, Mississippi, is in dispute.
2. This boundary dispute between the States is subject to the exclusive original jurisdiction of the Supreme Court of the United States.
3. An action is presently pending in the United States District Court, Western Division of the Southern District of Mississippi, entitled *Julia Donelson Houston, et*

al, vs. Ruth M. Thomas, et al., Civil Action No. W86-0080(B), wherein, as shown by Exhibit "A", the Complaint to Remove Cloud, complainants in said civil action are claiming ownership of a portion of lands involved in

* * *

No. [114] Original
In The
Supreme Court of the United States
 October Term, 1988

STATE OF LOUISIANA,

Plaintiff.

v.

STATE OF MISSISSIPPI, ET AL.,

Defendants.

COMPLAINT AND APPLICATION FOR
STAY ORDER

* * *

[p. 11] XVIII.

Consequently, in the necessary and essential exercise of sovereign rights, the exact location of the boundary line between Mississippi and Louisiana in the area at controversy becomes of major and substantial significance to the respective states, in view of the great value

of the lands and water bottoms for navigational, hunting, fishing, timber and recreational purposes, as well the potential for the production of oil, gas and other minerals. Heretofore, it has not been necessary to determine with [p. 12] preciseness the exact location of such boundary line. This controversy now makes such a determination essential to the two sovereign states, as well as to their citizens.

XIX.

The property rights, the sovereign rights and the sanctity of the boundary between the States of Louisiana and Mississippi are inextricably involved in the private litigation which commenced this controversy, thus instituted and pending in the United States District Court for the Western Division of the Southern District of the State of Mississippi, and said Court is not the forum proper to such determinations. Nor is the State of Louisiana required to submit its title to said court, nor should it be.

XX.

The decision of the Supreme Court of the United States herein will be conclusively binding on all private parties and it alone has the power to fix and determine the boundary lines herein described. The suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.*, should be stayed by Order of this Court until a final judgment herein can be had, and application is hereby made by the State of Louisiana for an Order to be issued by this Court,

directed to the United States District Court, Western Division of the Southern District of Mississippi, staying all proceedings in said suit.

XXI.

The jurisdiction of the Supreme Court of the United States in boundary disputes between States is exclusive and original and accordingly it is appropriate that the suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas*, [p. 13] *et al.*, be stayed and all parties thereto be served with a copy of the Stay Order herein applied for, and be given the opportunity to assert such interests as they may have in this action.

WHEREFORE, PREMISES CONSIDERED.

* * *

BRIEF OF THE STATE OF LOUISIANA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE ORIGINAL SUIT AND FOR STAY ORDER.

[p. 16] II.

THE MOTION FOR LEAVE TO FILE SHOULD BE GRANTED

Jurisdiction vests since this is a suit between the States of Louisiana and Mississippi in which private persons are also proper parties due to the nature of the boundary dispute.

The value of the property involved in [sic] great. The rights of the State of Louisiana are real and substantial.

The controversy exists and is justiciable. The Supreme Court of the United States is the only forum to settle this dispute, fix the boundary line between the states, and determine finally the rights of the parties. See *Florida v. Georgia*, 17 How. 478 (1854); *Oklahoma v. Texas*, 158 U.S. 574, 66 L.Ed. 771, 42 Sup. Ct. 406 (1922).

This court has entertained jurisdiction in such controversies on numerous occasions, and has done so in several prior Mississippi River boundary cases between Louisiana and Mississippi, as in *Louisiana v. Mississippi*, 202 U.S. 1, 50 L.Ed. 913, 26 S.Ct. 408 (1906); *Louisiana v. Mississippi*, 282 U.S. 458, 75 L.Ed. 459, 51 S.Ct. 197 (1931); and *Louisiana v. Mississippi*, 384 U.S. 24, 16 L.Ed. 2d 330, 86 S.Ct. 1250 (1966).

* * *

No. 114, Original

**In the Supreme Court of the United States
OCTOBER TERM, 1988**

STATE OF LOUISIANA,
Plaintiff,

vs.

STATE OF MISSISSIPPI, ET AL.,
Defendants.

**BRIEF IN OPPOSITION TO
MOTION FOR LEAVE TO FILE COMPLAINT**

MIKE MOORE, Attorney General
State of Mississippi

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Attorneys for Defendants

November, 1988

E. L. MENDENHALL, INC.,
926 Cherry Street, Kansas City, Mo. 64106,
(816) 421-3030

* * *

[p. 6] Mississippi. All necessary and indispensable parties are before the Court.

Here, Louisiana has an adequate forum to present its claims – the United States District Court for the Southern District of Mississippi – where the same issues are before the District Court. Louisiana chose its forum to litigate the issues. Louisiana intervened as a party in a District Court suit – a suit that was simply an action to remove cloud on title.

Houston brought the suit to establish the boundary line to their land. It is incidental that the boundary line is also alleged to be the State line. The boundary line could have been an established roadway or an inland stream.

A denial of the Louisiana motion would work no irreparable harm upon Louisiana, would avoid further glutting the docket of this Court, and would avoid the expense and delay occasioned by the appointment of a Special Master. The last action of this nature filed by Louisiana, in which a Special Master was appointed to try the issues, resulted in a cost to the parties for the fees of the Special Master alone in excess of \$64,000.00. *Louisiana v. Mississippi*, 466 U.S. 921, 80 L.Ed.2d 175, 104 S.Ct. 1701. These judicial economics are particularly important as the proceedings were begun in the United States District

Court in July, 1986. The proceedings are ready to proceed to trial before the District Court.

Here, justice is far better served by a trial in the lower court, with appropriate review, than by a trial before a Special Master whose rulings this Court simply cannot consider with the care and attention it should.

[p. 7] In the event any parties are dissatisfied with the result reached by the United States District Court, they have the recourse of the normal appellate process of federal courts, including the review in this Court on Writ of Certiorari.

CONCLUSION

For these reasons, the Court should deny the Motion for Leave to File Complaint and should remit the case to the United States District Court for the Southern District of Mississippi, Western Division, for further proceedings.

Respectfully submitted,

MIKE MOORE, Attorney General
State of Mississippi

By: ROBERT E. SANDERS
(Counsel of Record)
Special Assistant Attorney General
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88a

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Attorneys for Defendants

89a

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 3, 1988

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

Gary L. Keyser, Esquire
Assistant Attorney General
State Capitol
Baton Rouge, LA 70804

Re: State of Louisiana v. State of Mississippi, et al.
No. 114, Original (Application No. A-239)

Dear Mr. Keyser:

The Court today entered the following order in the above-entitled case:

"The application for stay of proceedings in the United States District Court for the Southern District of Mississippi in the case of Julia Donelson Houston, et al. v. Ruth M. Thomas, et al., C.A. No. W86-0080(B) presented to Justice White and by him referred to the Court is denied."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Francis J. Lorson
Chief Deputy Clerk

kb

cc: The Honorable Buddy Roemer, Governor of Louisiana
 The Honorable Ray Mabus, Governor of Mississippi
 The Honorable Michael Moore, Attorney General of Mississippi
 Robert R. Bailess
 George F. Fox, Jr.
 Archie L. Jefferson
 William F. Naff
 Hines H. Baker, Jr.
 M. E. Ward

[Reported at 488 U.S. 808]

No. 114, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. Motion for leave to file bill of complaint denied. [For earlier order herein, see *ante*, p. 808.]

JUSTICE WHITE, with whom JUSTICE STEVENS and JUSTICE SCALIA join, dissenting.

Louisiana's complaint against Mississippi is plainly within our original jurisdiction and alleges a boundary dispute with Mississippi, the very kind of a dispute that countless times the Court has accepted and adjudicated under its original jurisdiction. Furthermore, as 28 U.S.C. §1251(a) prescribes, the Court has exclusive jurisdiction over controversies between States. No other court may entertain Louisiana's complaint against Mississippi.

It is true that Louisiana intervened in a dispute between private parties over the ownership of land on an island in the Mississippi, claiming that the land was in that State. That suit might settle the dispute among the parties and the State, but a judgment that the island is in Louisiana would not bind Mississippi. For that reason, I suppose, Louisiana filed a third-party complaint against Mississippi and also sought leave to file an original action in this Court. We prefer to have disputes within our original jurisdiction settled in other fora where possible. See, *e.g.*, *Arizona v. New Mexico*, 425 U.S. 794 (1976). But this boundary dispute between two States is exclusively our business and as such, may not be adjudicated in the District Court. Had Louisiana not intervened in the private action, denying leave to file would surely be indefensible. Perhaps denial of leave to file rests on the possibility that the private action will go forward with Louisiana as a party and that a judgment unfavorable to,

but binding on Louisiana will be entered. For me, however, this is no way to treat a sovereign State that wants its dispute with another State settled in this Court. I would grant leave to file.

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543**

February 27, 1989

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

Mr. Gary L. Keyser
Asst. Attorney General
State of Louisiana
P.O. Box 94095
Baton Rouge, LA 70804-9095

Re: Louisiana v. Mississippi, No. 114 Original

Dear Mr. Keyser:

The Court today entered the following order in the above-entitled case:

"The petition for rehearing and alternative motion to file a separate complaint is denied."

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

By:

Francis J. Lorson
Chief Deputy Clerk

lg

cc: Al Nusso,
Asst. Attorney General of Mississippi
Robert R. Bailess, Esq.
George F. Fox, Jr., Esq.
Archie L. Jefferson, Esq.
William F. Naff
Hines H. Baker, Jr., Esq.
M. E. Ward, Esq.

[Reported at 489 U.S. 1050]

No. 114 Original

In the
 Supreme Court of the United States
 October Term, 1988

STATE OF LOUISIANA,
 Plaintiff,
 v.
 STATE OF MISSISSIPPI, ET AL.,
 Defendants.

PETITION FOR REHEARING BY THE STATE OF
 LOUISIANA OF ITS MOTION TO FILE
 COMPLAINT; AND ALTERNATIVE MOTION TO
 FILE SEPARATE COMPLAINT AND
 BRIEF IN SUPPORT

WILLIAM J. GUSTE, JR.
 Attorney General
 State of Louisiana
 State Capitol
 Baton Rouge, Louisiana 70804

GARY L. KEYSER
 DAVID C. KIMMEL
 Assistant Attorneys General
 State of Louisiana

* * *

[p. 2] 2.

The property rights, the sovereign rights and the location of the boundary between the States of Louisiana and Mississippi, all important legal issues, are involved in the litigation which commenced this controversy in the United States District Court, and said Court is not the proper forum to make such determinations in matters between states. Parenthetically, a judgment by the District Court in this matter would not necessarily bind all parties at issue, particularly as concerns the boundary question and the validity of the original United States patent. The decision of the Supreme Court of the United States in this matter will be conclusively binding on all private parties, as well as the states, and it alone has the power to fix and determine the boundary lines herein described.

* * *

[p. 8] A trial of the case in Jackson, Mississippi, would no doubt give at least the appearance of partiality to some, which a case of this type does not justly deserve.

II.

THE STATES ARE THE REAL PARTIES AT INTEREST

While all of the parties whose presence is indispensable, necessary or proper for the determination of this case between the states are properly involved, the states are the real parties at interest as concerns the location of

their common boundary and the ownership of the water-bottoms which adjoin it. They are not merely representing the interests of their citizens, who have related interests which can be determined at the same time.

* * *

[p. 9] III.

IT IS ESSENTIAL THAT THE SUPREME COURT ASSERT ITS JURISDICTION, AND SUCH IS IN THE INTEREST OF JUDICIAL ECONOMY

While it is possible for the District Court to reach some type of decision affording relief to some of the parties involved, a judgment by the District Court that Island No. 94 is in Louisiana would not bind Mississippi, nor necessarily the numerous private parties involved. Such a judgment would not necessarily deter dual assessment and taxation by the taxing bodies of the two states, nor dissuade both Mississippi and Louisiana claimants from asserting acts of ownership and possession.

A district court decision will, however wise, lead inevitably to an appeal of the case and, thence, certainly to this Court for final resort. Consequently, the time of the appellate court will also be consumed and, ultimately, the time of this Court as well.

It can hardly be imagined that the Supreme Court will not take jurisdiction in a case of this magnitude since it has, as a matter of record, already recognized the essential need for hearing matters of similar kind, while not taking jurisdiction of every possible case. See *State of Louisiana v. State of Texas*, 176 U.S. 1, 16, 44, 44 L Ed 347,

353, 20 S Ct 251 (1899); *Texas v. Louisiana*, 426 U.S. 465, 48 L Ed 2d 775, 96 S Ct 2155 (1976); *Commonwealth of Massachusetts v. State of Missouri*, 308 U.S. 1, 19-20, 84 L Ed 3, 60 S Ct 39 (1939); and *Oklahoma v. Texas*, 258 U.S. 574, 66 L Ed 771, 42 S Ct 406 (1922).

* * *
